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No. ———

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IN THE

Supreme Court of the United States

October Term, 1982

BASIC/FOUR CORPORATION,
Petitioner,

against

CENTRAL MICROFILM SERVICE CORP.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Questions Presented

1. Whether the Eighth Circuit's issuance of the extraordinary writ of mandamus directing the District Court to vacate its order for a new trial and to enter judgment for respondent is proper, particularly in view of this Court's holding in *Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 36 (1980), that the ordering of a new trial will "rarely, if ever, . . . justify the issuance of a writ of mandamus."

2. Whether the failure of the Eighth Circuit to follow squarely applicable decisions of this Court and of other federal Courts of Appeals so far departs from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision and the summary reversal of the Eighth Circuit's decision.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner Basic/Four Corporation ("B/4") prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this action on September 24, 1982.

Opinions Below

The opinion of the Court of Appeals (1a-31a)[1] granting the petition for mandamus of Central Microfilm Service Corp. ("CMS") and directing the District Court to enter

1. Citations bearing the suffix "a" refer to the pages of the Appendix to this Petition; citations bearing the prefix "C.R." refer to pages of the Clerk's Record, filed in the United States Court of Appeals for the Eighth Circuit, which will be filed as part of the certified record of this Court should this Petition be granted.

a judgment in the full amount of the jury verdict is reported at 688 F.2d 1206 (8th Cir. 1982). The opinion of the United States District Court (33a-56a) denying B/4's post-trial motion to set aside the verdict as to one claim (breach of contract), and granting B/4 a new trial as to the other claim (fraud) unless CMS accepted a reduced verdict on that count, is not officially reported.

Jurisdiction

This Petition for a writ of certiorari is filed within 90 days after the denial by the Court of Appeals (32a) on October 26, 1982 of B/4's timely petition for rehearing, and suggestion for rehearing in banc, of the initial judgment of the Court of Appeals which had been entered on September 24, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutes Involved

Sections 1291, 1292 and 1651(a) of Title 28, United States Code, which are involved, are set out verbatim in the Appendix hereto (57a-58a).

Statement of the Case

This litigation arises out of B/4's termination of its dealership agreement with CMS.[2] CMS, the former B/4 exclusive dealer for the St. Louis area, sued B/4 for wrongful termination, alleging breach of contract and fraud (C.R.

2. CMS had entered into a dealership contract with B/4, then a wholly-owned subsidiary of Management Assistance Inc. ("MAI"). In October 1980, B/4 was merged into, and became the Basic Four Information Systems Division of, MAI.

1-5). Federal jurisdiction was based on diversity (28 U.S.C. § 1332).

An initial trial verdict for CMS (C.R. 136-37) was set aside, and a new trial ordered (C.R. 144-46).

The retrial resulted in a substantially reduced jury verdict for CMS (C.R. 189-90). B/4's post-trial motion for judgment notwithstanding the verdict, or, in the alternative, a new trial, was denied as to the contract claim, but a new trial was granted as to the fraud claim unless CMS accepted a remittitur (33a-56a). CMS did not accept the remittitur, and the new trial order became effective. CMS subsequently purported to appeal from, *inter alia*, that order (C.R. 226); B/4 moved to dismiss the appeal and, to preserve its rights, cross-appealed (C.R. 227). CMS then also sought a writ of mandamus to review that order.

The Court of Appeals for the Eighth Circuit, in a decision dated September 24, 1982, (a) dismissed the appeal and cross-appeal for lack of jurisdiction; (b) concluded that the new trial order following the first trial had been proper; (c) concluded that the remittitur/new trial order, following the second trial, had been improper; and (d) granted CMS' petition for a writ of mandamus and directed the District Court to reinstate the second jury verdict (1a-31a).

In this Petition, B/4 seeks reversal of the Eighth Circuit's use of a writ of mandamus to review the District Court's new trial order.

Reasons for Granting the Writ

The Court of Appeals erroneously held that mandamus is an appropriate remedy for an alleged error in the granting of a new trial. This holding conflicts with applicable decisions of this Court as well as with the decisions of other federal Courts of Appeals. Moreover, this decision so far departs from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

I

The Eighth Circuit's Issuance Of A Writ Of Mandamus Was So Clearly Improper As To Require Summary Reversal.

In *Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. 33 (1980), this Court in a *per curiam* opinion swiftly and soundly rejected the use of a writ of mandamus to overturn a District Court's new trial order. So erroneous was the use of the writ that this Court decided the matter without the filing of briefs or oral argument.

The circumstances of *Allied Chemical* are, in all relevant respects, indistinguishable from those in the case at bar. In both cases the District Court ordered a new trial after a determination that the evidence did not support the jury's damage award. In both cases the District Court had available to it a means to reject the damage award without

ordering a new trial, but declined to use that procedure.[3] In *Allied Chemical*, this Court summarily reversed the issuance of mandamus; the same result is required here.

This Court in *Allied Chemical* emphasized that its definitive disposition of the issue was required because "[o]nly exceptional circumstances, amounting to a judicial usurpation of power, will justify the invocation of this extraordinary remedy" of mandamus (449 U.S. at 35), explaining that this "chary authorization of mandamus" was necessary to avoid "piecemeal appellate litigation" (*ibid.*). Thus, this Court continued—consistent with the Congressional injunction since adoption of the Judiciary Act of 1789 that appellate review should occur only after a final judgment has been entered by the trial court (see 28 U.S.C. § 1291)—mandamus may not be issued unless the party seeking issuance of the writ has "no other adequate means to attain the relief he desires" (449 U.S. at 35; citation omitted).

Applying these principles to a new trial order, this Court in *Allied Chemical* stated:

> "A trial court's ordering of a new trial rarely, if ever, will justify the issuance of a writ of madamus. On the contrary, such an order is not an uncommon feature of any trial which goes to verdict. A litigant is free to seek review of the propriety of such an order on direct appeal after a final judgment has been entered. Consequently, it cannot be said that the litigant

3. In *Allied Chemical*, the party which had been granted mandamus sought to avoid a complete new trial by having the judgment as to liability reinstated; here, similarly, CMS asked for reinstatement of the verdict or entry of a reduced judgment (Petition For Writ Of Mandamus, p. 19).

'has no other adequate means to seek the relief he desires.' " *Id.* at 36.

See also *Roche* v. *Evaporated Milk Association*, 319 U.S. 21 (1943), in which this Court reversed the Court of Appeals' grant of a writ of mandamus, holding it improper because the District Court's decision—even if erroneous and even if it imposed an unnecessary "costly and inconvenient" trial of "several months' duration" (*id.* at 30)—was within the District Court's discretionary authority.

Thus, as was the case in *Allied Chemical* and in *Roche*, "[i]n issuing the writ the court of appeals below has done no more than substitute mandamus for an appeal contrary to the statutes and policy of Congress" (319 U.S. at 32).

All Courts of Appeals applying *Allied Chemical*, and most of those faced with the issue prior to its decision, have recognized that use of mandamus to review a new trial order is improper. See, *e.g.*, *United States* v. *Sam Goody, Inc.*, 675 F.2d 17, 25-27 (2d Cir. 1982) (mandamus to be granted only in "extraordinary circumstances," "not . . . merely because it is the only way in which the district court's new-trial order might be reviewed"); *United States* v. *Winner*, 666 F.2d 447, 449-50 (10th Cir. 1981) (same); *Delano* v. *Kitch*, 663 F.2d 990, 1001-02 (10th Cir. 1981), *cert. denied*, 102 S. Ct. 2012 (1982) (mandamus improper to review new trial order following second trial); *Pat Ryan & Associates, Inc.* v. *Dupree*, 474 F.2d 1342 (4th Cir. 1973) (opinion unpublished) (mandamus improper to review order of new trial based on finding that jury awarded excessive damages); *Thorn* v. *Parkland Chevrolet Co.*, 416 F.2d 95 (4th Cir. 1969) (final judgment rule cannot be

avoided by use of mandamus); *Bigart* v. *Goodyear Tire & Rubber Co.*, 361 F.2d 317, 318-19 (2d Cir. 1966) (mandamus not appropriate to review new trial order); *Gottlieb* v. *Rubenstein*, 252 F.2d 779 (6th Cir. 1958) (mandamus "not to be used as a substitute for an appeal" of a remittitur/new trial order).

In issuing the writ of mandamus, the Eighth Circuit thus made an important and radical departure from settled federal law. Its ruling conflicts with decisions of this Court and of Courts of Appeals for other circuits. Therefore, this Petition for certiorari should be granted.

II

The Court Below Erred In Ignoring The Mandate Of *Allied Chemical*.

It is axiomatic that "the remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Allied Chemical Corp.* v. *Daiflon, Inc., supra*, 449 U.S. at 34. See also *Will* v. *United States*, 389 U.S. 90, 104 (1967) ("Mandamus, it must be remembered, does not 'run the gauntlet of reversible errors.' [Citation omitted] Its office is not to 'control the decision of the trial court,' but rather merely to confine the lower court to the sphere of its discretionary power"). Yet, the Court of Appeals below, in conflict with this Court's decisions, granted this extraordinary remedy to overturn the District Court's singularly unexceptional new trial order.

Recognizing, as it was compelled to, the controlling precedent of *Allied Chemical*, the Court of Appeals below

nevertheless concluded that mandamus was appropriate (8a-10a): (a) because the evidentiary issue upon which the new trial order was based was purportedly not a question committed to the District Court's discretion; (b) because the new trial order in question followed a second trial; and (c) because the district courts need guidance as to how to rule on a post-trial motion upon determining that a verdict is excessive by a sum certain.

None of these factors warranted the Eighth Circuit's deviation from the clear rule enunciated by this Court.

A. The District Court's New Trial Order Was Within Its Discretion.

The Eighth Circuit was in error when it held that the issue on which the District Court based its new trial order was not one "traditionally deemed a matter of trial court discretion" (8a). The District Court ordered a new trial because of the inclusion in the jury award of damages that were not supported by the evidence.[4] This is precisely the

4. The Court of Appeals omitted from its recitation of the District Court's decision the following italicized language:

> "With respect to software service costs the Court finds that the jury unjustly compensated plaintiff in Count V [fraud]. Credible evidence showed that from January 7, 1977, through March 31, 1979, plaintiff had sales of $170,322.00 against expenses of $210,909.00 for a loss of $40,587.00. *See* Ex. 66C-2. *The credible evidence showed further that in spite of a competitive software services market and a crying need to bolster sales plaintiff invested substantial time and effort in software services.* This was required neither by the [dealership] Agreement nor at the request of defendant. Accordingly, the Court finds that the jury award in Count V improperly included $40,587.00 in losses for computer software services" (52a; emphasis added).

The italicized sentence constitutes a finding of fact upon which the District Court relied in reaching its decision. Only the District Court, by virtue of its conduct of the trial, was in a position to reach this conclusion.

type of finding traditionally left to the District Court's discretion. See, *e.g., United States* v. *Johnson,* 327 U.S. 106, 111 (1945) ("[I]t is not the province of . . . the circuit court of appeals to review orders granting or denying motions for a new trial when such review is sought on the alleged ground that the trial court made erroneous findings of fact").

More important, of course, is the fact that, even if the District Court acted beyond its discretion, its conduct hardly constituted "exceptional circumstances, amounting to a judicial usurpation of power," as is required for mandamus. *Allied Chemical Corp.* v. *Daiflon, Inc., supra,* 449 U.S. at 35. Rather, CMS made, at most, nothing more than a "simple showing of error," which this Court has explicitly held not properly reviewable by mandamus. *Ibid.* Allowance of the use of mandamus in this situation would encourage the frequent characterization, by disgruntled litigants, of new trial orders as "judicial usurpations of power." The inevitable effect of such a trend would be a weakening of the Final Judgment Rule and a denial of the sound rationale on which it is based.

B. It Is Irrelevant That The District Court's Order Followed A Second Trial.

That the District Court's new trial order in effect ordered a third trial is irrelevant. Because the new trial order following the first trial was warranted, as the Court of Appeals explicitly held (10a-11a), the posture of this case at this point is equivalent to that of any other case—including *Allied Chemical*—in which a new trial order follows a jury verdict.

The exception sought to be created by the Court of Appeals below conflicts with the decisions of other federal Courts of Appeals. These courts have rejected the propriety of mandamus to permit immediate review of a new trial order following a second trial. See, *e.g.*, *Delano* v. *Kitch*, *supra*, 663 F.2d at 1001-02 (mandamus improper to review new trial order after second trial); *Conway* v. *Chemical Leaman Tank Lines, Inc.*, 644 F.2d 1059 (5th Cir. 1981) (proper for district court to set aside second trial verdict, after first trial verdict had been set aside, and order third trial); *General Motors Corp.* v. *Perry*, 303 F.2d 544, 545 (7th Cir. 1962) (mandamus denied to vacate new trial order following second trial); *General American Life Ins. Co.* v. *Central Nat. Bank of Cleveland*, 136 F.2d 821 (6th Cir. 1943) (district court improperly declined to consider on merits motion for new trial after third trial).

The Eighth Circuit's use of mandamus here simply reflects its dissatisfaction with Congress' decision, in the Final Judgment Rule, to preclude appealability of new trial orders. But any change of that rule must be made by Congress, not by the Courts. It is within the exclusive province of Congress to legislate an exception to the Final Judgment Rule providing for appeals from new trial orders following second trials.[5] Its failure so to act must be binding on the Court of Appeals below.

5. Indeed, Congress did provide, in 28 U.S.C. § 1292, for interlocutory appeals in certain circumstances. This case does not fall within the allowable interlocutory appeals set forth in § 1292(a); significantly, CMS did not attempt to avail itself of the mechanism set forth in § 1292(b) for certifying other interlocutory appeals.

C. There Was No Need For District Court Guidance So As To Justify The Use Of Mandamus.

The Court of Appeals also based its decision in part on the district courts' purported need for guidance as to whether a new trial, rather than a reduced judgment, should be ordered when the only flaw in a jury verdict is its excessiveness due to the jury's inclusion of an amount certain (10a).

The practice of ordering a new trial unless the plaintiff agrees to a remittitur of excessive damages is well-established, and within a district court's discretion. 11 Wright & Miller, *Federal Practice and Procedure*, § 2815, at 100 (1973); 6A Moore's *Federal Practice* ¶ 59.08[7] (2d ed. 1982); *Holmes* v. *Wack*, 464 F.2d 86, 89 (10th Cir. 1972); *Cosentino* v. *Royal Netherlands Steamship Co.*, 389 F.2d 726 (2d Cir.), *cert. denied*, 393 U.S. 977 (1968); *Dorin* v. *Equitable Life Assurance Society of the United States*, 382 F.2d 73, 77-78 (7th Cir. 1967); *Mooney* v. *Henderson Portion Pack Co.*, 339 F.2d 64 (6th Cir. 1964); *Gottlieb* v. *Rubenstein*, *supra*, 252 F.2d at 779-80.

Underlying the Eighth Circuit's questioning of this practice may be its desire to expedite respondent's right to appeal, which is postponed by the remittitur/new trial option. But this deferment is required by the Final Judgment Rule, which Congress has not seen fit to amend to provide for appealability under such circumstances.[6] A

6. Indeed, in *General Motors Corp.* v. *Lord*, 488 F.2d 1096, 1101 (8th Cir. 1973) (Bright, J. concurring), one judge of a different panel of the Court of Appeals below, recognizing that mandamus did not lie to obtain an immediate review of a new trial order, expressly asked for such amendment.

Court of Appeals may not emasculate that rule merely because one party to a lawsuit desires an immediate review rather than a new trial. As this Court stated in *Roche* v. *Evaporated Milk Association, supra,* 319 U.S. at 30, the "inconvenience [of a long, costly trial which could be avoided by immediate appellate review] is one which we must take it Congress contemplated in providing that only final judgments should be reviewable."[7]

Further, had the drafters of the Federal Rules deemed it appropriate to require a district court, upon finding a verdict excessive by a sum certain, to enter judgment for the reduced amount, they would have mandated such limited procedural option by appropriate amendment of the rules. The rules, however, do not prohibit the use of a remittitur option. The Court of Appeals below improperly assumed the power to effect such amendment.

Thus, the propriety of the form of order selected by the District Court is clear, and no further guidelines are needed. The decision of the Eighth Circuit in overriding that order by use of the extraordinary writ of mandamus therefore unduly departs from the accepted and usual course of judicial proceedings.

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7. Significantly, as the Eighth Circuit's opinion acknowledges, the vacating of its writ of mandamus and the consequent reinstatement of the District Court's new trial order could well have a meaningful effect on the outcome of this case. The Court of Appeals below at several points in its opinion recognized that the evidence would have sustained a verdict for either party (*e.g.,* 16a, 20a). Moreover, at one point (25a), the Court of Appeals below noted that a certain jury instruction requested by B/4 should have been given, if it had been requested in what that Court stated to be proper form.

Conclusion

For the foregoing reasons, this Petition for a writ of certiorari should be granted.

Dated: December 6, 1982

Respectfully submitted,

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Opinion and Judgment of the Court of Appeals

[688 F.2d 1206]

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Appeals from the United States District Court
for the Eastern District of Missouri.

No. 81-1822

Central Microfilm Service Corporation,
Appellant,

v.

Basic/Four Corporation, a Delaware Corporation,
Appellee.

No. 81-1868

Central Microfilm Service Corporation,
Appellee,

v

Basic/Four Corporation, a Delaware Corporation,
Appellant.

Petition for Writ of Mandamus.

No. 81-1984

In Re: Central Microfilm Service Corporation,
a Missouri corporation,
Petitioner.

Opinion and Judgment of the Court of Appeals

Submitted: May 20, 1982

Filed: September 24, 1982

Before LAY, Chief Judge, HEANEY, Circuit Judge, and BECKER,* Senior District Judge.

HEANEY, Circuit Judge.

In May of 1978, Basic/Four Corporation terminated its dealership agreement with Central Microfilm Service Corporation (CMS) and CMS filed a complaint alleging breach of contract and fraud. The first trial of these claims resulted in a substantial verdict in favor of CMS, which was set aside by the district court. The second trial resulted in a similar though smaller award for CMS, after which the district court ordered CMS to accept a remittitur or proceed to a third trial. CMS now seeks review of both proceedings, and Basic/Four cross-appeals, seeking judgment notwithstanding the verdict. We dismiss the appeal and cross-appeal for lack of jurisdiction, but grant CMS's petition for mandamus and direct that judgment be entered in the full amount of the verdicts returned in the second trial.

A. *Factual Background and Jurisdiction.*

In 1975, CMS and Basic/Four reached a written agreement pursuant to which CMS served as Basic/Four's dealer in the St. Louis market, selling the latter's computer hardware and accompanying software packages to small busi-

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* The Honorable William H. Becker, United States Senior District Judge, Western District of Missouri, sitting by designation.

nesses. Basic/Four's products initially were not well known in that market and early sales (at upwards of $45,000 per package) were very slow. CMS bore the costs of introducing the product, building a client base, developing local software programmers trained on Basic/Four's equipment and generally establishing the product in the St. Louis market. Although sales gradually increased, CMS never reached the point where it turned a profit on its computer dealership.

The dealership agreement included six-month sales quotas and allowed termination in the event such quotas were not attained in any one period. From the outset, CMS performed well below quota. In early 1977, CMS considered getting out of the computer business, but Basic/Four indicated that it wanted CMS to continue as its dealer. From time to time throughout the relationship, Basic/Four would suggest various personnel and other changes at CMS, most of which were adopted. Some of such changes were adopted in early 1978. In May, 1978, however, Basic/Four terminated the dealership for failure to meet quota and opened an in-house branch sales operation.

CMS filed the present breach of contract action, contending, under an estoppel theory, that Basic/Four waived its right to terminate for not meeting quota. CMS also alleged fraud, contending that Basic/Four had, by January of 1977, decided to open a branch operation in St. Louis and fraudulently induced CMS to continue as dealer until that event occurred. On the contract claim, CMS sought to recover the net losses it incurred as a dealer from 1975 through the termination. On the fraud claim, it sought to recover the same type of losses, but only for the period after January, 1977, when the fraud allegedly commenced.

The case proceeded to trial and, in May, 1979, a jury returned a verdict awarding CMS $261,000 on the contract claim, $73,000 in actual damages on the fraud claim and $750,000 in punitive damages on the fraud claim ($1,094,000 total). Sixteen months after the verdict, the district court rejected Basic/Four's motion for judgment notwithstanding the verdict (j.n.o.v.), but granted its alternative request for a new trial. The stated reasons for ordering a new trial[1] were that (1) the jury was erroneously instructed so as to allow an overlap or double recovery on actual damages, and (2) the punitive damage award was excessive.

A second trial was held and CMS again prevailed on its contract and fraud claims, this time recovering $182,000 on the contract count, $78,000 in actual damages on the fraud count and $390,000 in punitive damages for the fraud ($650,000 total). Basic/Four again moved for j.n.o.v. or a new trial, contending *inter alia* that certain instructions were erroneous, that Basic/Four was entitled to j.n.o.v. as a matter of law, and that the verdict was excessive. The district court rejected each principal contention raised in Basic/Four's motion. It ruled, however, that CMS's expenditures for software services were not required by the dealership agreement and were not requested by Basic/Four—and hence, losses related to such services were not recoverable. Excluding such losses would reduce the actual damages for fraud by $40,587. Because the jury appeared to have calculated the punitive damage award at five times the actual fraud damages, the court also made a correspond-

1. Additional reasons were disclosed during subsequent proceedings but are not material here in light of our holding as to the first new trial order. *See, infra,* at 1213-1214.

ing proportionate reduction in punitive damages, *i.e.*, to five times the reduced figure of actual damages. The court did not, however, enter a reduced judgment. Instead, it ordered a third trial unless CMS accepted a remittitur in accordance with the determination as to software losses.[2]

CMS declined to accept the remittitur and now seeks reversal of that order and reinstatement of judgment on the verdicts returned in either the first or second trial. Basic/Four initially moved to dismiss the appeal for lack of jurisdiction. We denied that motion without prejudice to Basic/Four's right to assert its jurisdictional claim on the appeal. Basic/Four chose not to press the jurisdictional issue and cross-appealed, contending it is entitled to judgment as a matter of law.[3] Both parties have fully briefed and argued the case on the merits. Before we address the merits, a threshold question is whether there is jurisdiction to review the judgments below.

Review by appeal generally follows the entry of final judgment in the district court. Here, however, the court coupled its remittitur with a contingent new trial order. The latter is considered an interlocutory order which is not ordinarily appealable. *See, e.g., Allied Chemical Corporation* v. *Daiflon, Inc.*, 449 U.S. 33, 34, 101 S.Ct. 188, 189, 66 L.Ed.2d 193 (1980); *Richardson* v. *Communication Workers of America*, 469 F.2d 333, 334 (8th Cir. 1972). They are immediately appealable, however, in the narrow cir-

2. Under the remittitur, judgment would be for $182,000 on the contract count, $37,413 in actual and $187,065 in punitive damages on the fraud count (totaling $406,478, or a reduction of more than $240,000 from the second jury verdict).

3. We do not suggest that the jurisdictional issue was, or could be, abandoned.

cumstances in which such orders are entered without authority. *See Peterman* v. *Chicago, Rock Island & Pacific Ry. Co.*, 493 F.2d 88, 91-92 (8th Cir. 1974). Here, CMS contends the second new trial order was entered without authority because the district court did not comply with the notice requirement under Rule 59.

Under Rule 59, a district court may, within ten days after entry of judgment, order a new trial on its own motion. When a court acts entirely on its own initiative, *i.e.*, when no party has timely moved for a new trial, the ten-day limit is strictly enforced. *Peterman* v. *Chicago, Rock Island & Pacific Ry. Co., supra*, 493 F.2d at 91-92 (absent a timely new trial motion, there is no authority to order a new trial outside the ten-day period). When a party has timely moved for a new trial but the court orders such relief on a ground not raised in the motion, the court is deemed to have acted on its own initiative. Under Rule 59, however, the court has authority to act outside the ten-day limit in this circumstance, provided it gives the parties notice and an opportunity to be heard and specifies the grounds on which it grants the new trial. *See* Wright & Miller, *Fed. Prac. & Proc.* § 2813.

The unsettled question is the effect of a court's failure to comply with the notice requirement when it grants a new trial on a ground not raised in the motion for such relief. At least one court implicitly has construed the notice requirement to be jurisdictional rather than procedural, such that failure to provide notice renders the order immediately reviewable on the merits. *See Harkins* v. *Ford Motor Company*, 437 F.2d 276, 277 (3d Cir. 1970) (expressly reserving whether, "in every case," this is the effect of a failure to

give notice). Commentators, however, have argued that a court's lack of notice under Rule 59 "should not make its action a nullity." Wright & Miller, *supra*, at § 2813, n.73; *see also* Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (II)*, 81 Harv. L. Rev. 591, 604 (1968).

We need not decide whether the notice requirement under Rule 59 is jurisdictional or procedural because, here, the purpose of such requirement was substantially achieved. It is arguably true that the district court's order for a third trial was granted on a ground not clearly raised in Basic/Four's motion and that there was no prior notice given by the court as to the issue relied upon in the court's decision. CMS moved for reconsideration, however, raising the objections which it would have raised if given prior notice. In giving consideration to such objections, the district court's actions comport with the basic purpose of the notice requirement. Accordingly, we decline to adopt a rule which would render new trial orders immediately appealable where the only defect is a technical lack of notice and such defect is cured by a subsequent opportunity to be heard. Because the new trial order is not immediately appealable, we dismiss the present appeal and cross-appeal for lack of jurisdiction.

CMS alternatively petitions for a writ of mandamus. Mandamus review generally is available only in extraordinary circumstances and such review of new trial orders in particular is "rarely" justified. *Allied Chemical Corporation* v. *Daiflon, Inc.*, *supra*, 449 U.S. at 36, 101 S.Ct. at 191. Because the right to mandamus must be "clear and indisputable," a district court's action generally must be "blatantly wrong" to justify mandamus relief; arguable error

within the scope of trial court discretion is not a proper basis for mandamus. *Cf. Allied Chemical Corporation* v. *Daiflon, Inc., supra,* 449 U.S. at 35-36, 101 S.Ct. at 190-191; *General Motors Corp.* v. *Lord,* 488 F.2d 1096, 1100 n.2 (8th Cir. 1974). Other factors which bear on the appropriateness of mandamus review include the need to correct error which is likely to recur and to provide guidelines for the resolution of novel and important questions. *See Schlagenhauf* v. *Holder,* 379 U.S. 104, 111-112, 85 S.Ct. 234, 238-239, 13 L.Ed.2d 152 (1964); *La Buy* v. *Howes Leather Co.,* 352 U.S. 249, 254-255, 258, 77 S.Ct. 309, 312-313, 314, 1 L.Ed.2d 290 (1957); *General Motors Corp.* v. *Lord, supra,* 488 F.2d at 1099. Perhaps the most fundamental concern is an avoidance of piecemeal litigation and disturbance of the orderly administration of the courts—key policies underlying the final judgment rule. *See Allied Chemical Corporation* v. *Daiflon, Inc., supra,* 449 U.S. at 36, 101 S.Ct. at 191. Finality is not served, however, by needless relitigation and it is proper to consider whether appellate review is "fundamental to further conduct of the case." *Gillespie* v. *United States Steel Corporation,* 379 U.S. 148, 152-154, 85 S.Ct. 308, 310-312, 13 L.Ed.2d 199 (1964); *Fireman's Fund Insurance Co.* v. *Aalco Wrecking Co., Inc.,* 466 F.2d 179, 187 (8th Cir. 1972).

Consideration of the foregoing factors makes mandamus review in this case not only appropriate but compelling. The conditional order for a third trial was not based on the type of finding which is traditionally deemed a matter of trial court discretion. When a district court finds that a verdict is excessive in relation to actual injuries, or that a jury was confused by erroneous instructions, or prejudiced

by erroneously admitted evidence, a new trial based on such findings is not often reversed because the very nature of the finding is a discretionary matter closely tied to the trial court's observation of the proceedings. *See, e.g., General Motors Corp.* v. *Lord, supra,* 488 F.2d at 110; *Solomon Dehydrating Co.* v. *Guyton,* 294 F.2d 439, 446-447 (8th Cir.), *cert. denied,* 368 U.S. 929, 82 S.Ct. 365, 7 L.Ed.2d 192 (1961). Here, however, the district court found that the jury was properly instructed, that the punitive damage award was not excessive and that the evidence supported the verdict as a whole. The sole ground for ordering a third trial was the inclusion of software losses in the award for actual damages. The court did not find that such losses were improperly measured—indeed, the evidence showed, the jury found and the court accepted that these losses totaled a sum certain of $40,587.00. It ruled, rather, that the software services were not recoverable because they were "required neither by the Agreement nor at the request of defendant." This is a discrete question of law and fact, the resolution of which is clear on the record and does not turn on a trial court's proximity to the proceedings.

Mandamus review in this case, moreover, will facilitate the purposes of the final judgment rule. The matter has twice been tried to a jury and the evidence was substantially the same at both trials. Twice the plaintiff has prevailed on its contract and fraud claims, obtaining substantial awards of actual and punitive damages. The only outstanding issues are CMS's contention that its software losses were properly recoverable and Basic/Four's claims that it was entitled to j.n.o.v. as a matter of law, that the punitive damage award was excessive and that the jury was given

erroneous instructions. Each of these issues has been squarely decided by the district court and a third trial would resolve nothing which has not already been resolved by the district court or the jury. Appellate review is thus "fundamental to further conduct of the case." Absent review, a third trial would present the type of needless relitigation which is antithetical to the final judgment rule. Moreover, in light of the district court's post-trial rulings, a third trial would be conducted with virtually the same instructions and evidence as at the second trial, so if the parties' assertions of error are valid, a fourth trial could well be necessary. An important issue is also presented on which guidance for future cases is appropriate: whether generally a new trial rather than a reduced judgment should be ordered when the only alleged defect involves a discrete question of law and fact relating to a sum certain in damages.

In light of all the foregoing considerations, we find that mandamus review is both appropriate and necessary.

B. *The First Trial.*

Issues arising out of the first trial do not require extensive discussion. In setting aside the results of that trial, the district court found that the jury was wrongly instructed so as to allow a double recovery on the contract and fraud claims. This arose because on the contract claim, recovery was had for all losses incurred between 1975 and the 1978 termination; while on the fraud claim, recovery was had for the same type of losses incurred during a subset of the contract period (*i.e.*, after the fraud allegedly commenced in January, 1977). The result was a $73,000 overlap which

CMS concedes it was not entitled to recover. *See Greenwood Ranches, Inc.* v. *Skie Construction Co., Inc.*, 629 F.2d 518, 521 (8th Cir. 1980).

The district court set forth other grounds for a new trial but we need not review them because the double recovery problem was sufficient to warrant the grant of a new trial.[4] It is true, as CMS suggests, the court might have simply reduced the award of actual damages by the amount of the overlap. It is fairly arguable, however, that the double recovery confused the jury so as to affect the figure for punitive damages as well. Under these circumstances, we cannot say it was an abuse of discretion to correct the conceded error by ordering a new trial rather than by reducing the amount of damages.[5]

C. *The Second Trial.*

The verdicts following the second trial were for CMS in the amount of $182,000 on the contract count and, on the fraud count, $78,000 in actual damages and $390,000 in punitive damages. The court ruled that the only defect in these verdicts was inclusion of software losses in the recovery for actual damages on the fraud count. No mention of

4. The court also ruled that the $750,000 punitive damage award was unduly excessive, in part because it was greater than the amount prayed for in the complaint. We note that an award is not excessive merely because it exceeds the amount stated in the prayer for relief. *See, e.g., Troutman* v. *Modlin*, 353 F.2d 382, 383, 384-385 (8th Cir. 1965). The court also found the punitive award to be disproportionate to the actual injury inflicted, constituting an abuse of discretion on the part of the jury—a determination which we need not review in light of our holding.

5. Compare the second new trial order, *infra*, at note 8.

this issue was made by the district court in the first new trial order nor at any point prior to issuance of the second new trial order.

At both trials, CMS sought to establish as damages the net losses it incurred from dealership operations. The basic proof of such losses was offered by CMS's chief accountant, who presented detailed figures as to sales revenue, direct costs and overhead allocations. Basic/Four disputed much of this evidence, arguing, for example, that too much overhead was allocated to the computer dealership operations, that various marketing and personnel recruiting expenses reflected bad judgment or unnecessary expenditures, and that software services were generally mismanaged. The particular claim as to software services was that more effective use of independent software vendors would have been less costly than the in-house programmers developed by CMS. The record includes correspondence and testimony showing that Basic/Four initially recommended hiring in-house programming staff and at later points urged greater reliance on independent vendors. CMS had to provide software services, but how to do so was within its discretion. As with the other disputed items, the reasonableness of specific software expenditures is a fact question for the jury. We note that the actual damages awarded in the two trials were remarkably similar—$261,000 in the first trial and $260,000 in the second.[6] The district court ana-

6. In the first trial, total actual damages are reflected in the contract count (which then overlapped with the recovery on the fraud count, *see, supra,* at 1213-1214. In the second trial, the jury was instructed to reduce the contract count recovery by the amount of any actual damages awarded on the fraud count, to avoid double recovery. Thus, the total awarded at the second trial is the sum of actual damages on the contract and fraud counts.

lyzed most of the disputed items in terms of the reasonableness of the jury's award and the sufficiency of the evidence. On every item examined in this manner, the court affirmed the jury's determination.

The court did deny recovery, however, for one item. It ruled that CMS's substantial investment in software services "was required neither by the Agreement nor at the request of defendant. Accordingly, the Court finds that the jury award in Count V improperly included $40,587.00 in losses for computer software services." This determination is clearly wrong.

The dealership agreement expressly required CMS to provide "adequate software programming to meet the requirements of purchasers." In addition, the summary of the dealership program which Basic/Four distributed prior to reaching the agreement, and the course of dealings between these parties thereafter, leave no doubt that CMS alone had the duty, if it was to serve as a dealer, to obtain and provide software services which would adapt the basic systems to the particular needs of customers.

Basic/Four concedes this much, as it must. It attempts to construe the court's ruling to be a determination that CMS was grossly inefficient in handling software services, as Basic/Four had argued at trial. There was indeed a factual dispute at trial as to independent versus in-house software services, which the jury resolved against Basic/Four.[7] If, as Basic/Four argues, the district court sought to set aside the jury's determination by substituting its view

7. Because the jury awarded virtually all amounts requested as actual damages, we must assume they rejected Basic/Four's arguments for arriving at a smaller figure.

as to a lower figure for software services, CMS might with good cause argue that such an action unreasonably invades the province of the jury. But the court did not purport to do so. It did not deem some software expenditures reasonable and others unreasonable, nor did it make a partial reduction in the award for such items. The court expressly tallied all software revenues during the period of the fraud, subtracted all software costs and denied all recovery for the difference—expressly ruling that it did so because the software expenditures were not required under the agreement. The court's action is thus clear, as is the error on which it rests.

The court also ruled that the second verdict award of $390,000 in punitive damages was based on sufficient evidence and was not excessive. It directed a reduction in this award only to correspond to the mistaken reduction in actual damages. The reasoning was that because the jury awarded punitive damages at five times the actual fraud damages, and because the actual damages were reduced to exclude software losses, a proper punitive award should be only five times the reduced amount of actual damages. *See Ogilvie* v. *Fotomat Corp.*, 641 F.2d 581, 585 (8th Cir. 1981). We need not decide whether such corresponding reductions are always necessary or appropriate, because here, there is no basis for the reduction once the error is corrected as to the software losses.

Apart from the software exclusion, the district court's rulings fully upheld the punitive and actual damages. The district court rejected every claim advanced by Basic/Four as to instructions, the weight of the evidence, the need for

a new trial and the asserted right to j.n.o.v.[8] Thus, once the software error is corrected, CMS is entitled to judgment in the full amount awarded at the second trial ($650,000), and a writ of mandamus should issue in accord therewith. Such a writ would not be proper, however, if Basic/Four's claims of error are valid. In other words, the order for a third trial would not constitute an abuse of discretion if there were prejudicial errors as alleged by Basic/Four. Accordingly, we turn to the claims raised by Basic/Four.

The principal contention of Basic/Four is that it was entitled to j.n.o.v. as a matter of law on both the contract and fraud counts. The district court carefully considered and rejected these claims, properly emphasizing that one "must view the evidence in the light most favorable to sustaining the jury's findings and must give the prevailing party the benefit of every reasonable inference which may be drawn from the evidence." *Davis* v. *Burlington Northern*, 541 F.2d 182, 186 (8th Cir.), *cert. denied*, 429 U.S. 1002, 97 S.Ct. 533, 50 L.Ed.2d 613 (1976). We agree that Basic/Four is not entitled to j.n.o.v.

As to the contract count, Basic/Four contends that an estoppel was not established because (1) Basic/Four did not engage in conduct inconsistent with exercising its right of termination, (2) any estoppel was effectively revoked by

8. Thus, unlike the first new trial order, the second order reflects a full and final determination by the district court of every factual and legal claim raised by the parties. The sole alleged defect involved a discrete issue which no one contends confused the jury or otherwise affected the verdict or any of the proceedings. Under these circumstances, particularly where a case has twice been tried to a jury, we think the better practice is to order a reduction in judgment rather than a new trial. Of course, where other factors warrant a new trial, such relief may be ordered. Here, however, in view of the district court's post-trial rulings, a third trial constitutes clearly useless relitigation and it was an abuse of discretion to order it.

certain reassertions of the right to terminate for failure to meet quota, and (3) there was insufficient evidence of reliance or injury.

With respect to the reliance and injury issues, we agree with the district court that there was sufficient evidence to create a jury question. The more arguable claim is, essentially, that Basic/Four encouraged CMS to do only what it was required to do as a dealer,[9] and that it expressly reserved the right to terminate on quota grounds, such that it cannot be estopped to terminate on grounds of the sales quota. There is evidence to support this theory of the case, but there is more than sufficient evidence to support the jury's verdict.

Briefly, the evidence shows that Basic/Four repeatedly declined to terminate for failure to meet quota; that it was actively involved in CMS's operations throughout the period; and, indeed, that just months before termination, Basic/Four urged CMS to hire new sales staff and remodel its facilities. CMS adopted most of these changes and could reasonably view Basic/Four's urgings as evincing an intent to continue the dealership notwithstanding that sales had been and remained below quota. A jury certainly could find that CMS adopted many of Basic/Four's suggestions in reliance on non-termination under the quota clause. It is also important that in early 1977, following a sustained period of low sales and failure to meet a probationary quota, Basic/Four met with CMS, declined to terminate and expressly stated that it wanted CMS to continue as dealer.

9. This is the core reasoning behind the claim that Basic/Four's conduct was not inconsistent with its right to terminate for failure to meet quota.

Thus, a jury could find that CMS reasonably believed it would be continued as dealer if it continued in good faith to promote Basic/Four's products.

The few specific reservations of a right to terminate for failure to meet quota constitute only one factor to be weighed against the other evidence of estoppel—Basic/Four's repeated non-termination when sales were worse, its expressions of a desire to continue CMS as dealer and its affirmative conduct which by its nature evinces a determination to continue CMS as dealer notwithstanding the sales quota. In short, we agree with the district court that it was for the jury to decide whether there was a breach of contract by estoppel.

As to the fraud count, Basic/Four contends it is entitled to j.n.o.v. on numerous grounds, all of which rest on fundamental mischaracterizations of CMS's fraud theory. The fraud allegedly commenced in January, 1977, when Basic/Four met with CMS following failure to meet a probationary sales quota. Basic/Four expressly represented that, notwithstanding such failure, it wanted CMS to continue as its dealer. Basic/Four characterizes this representation as an isolated representation which, even if fraudulent when made, effectively expired in the face of subsequent events, *e.g.*, when the next quota period arose, when the initial three-year term of the contract expired, or when Basic/Four made subsequent reassertions of a right to terminate on quota grounds. It also argues that there could be no reliance and the representation could not be material nor be the proximate cause of injury, because whatever conduct was induced on the part of CMS was, in any event, required performance under the dealership contract.

CMS, however, characterizes the January, 1977, meeting as a "cross-roads" session, coming after failure to meet what Basic/Four had established in the way of a probationary quota. Up to this point, CMS had lost over $180,000 on the dealership and at least one senior CMS officer was considering getting out of the dealership rather than attempt to recoup such losses by investing more funds. One alternative, of course, was to invest more and salvage the dealership through a longer-term turnaround. It appears that at least some CMS officials expected Basic/Four to announce its desire to terminate in the face of continuing difficulties and quota non-attainment. Basic/Four opened the meeting by announcing its desire, notwithstanding the sales problems, to have CMS continue as its dealer. Over the following sixteen months, Basic/Four encouraged CMS's efforts and urged specific personnel and marketing changes, most of which were adopted, and sales gradually improved.

In CMS's view, the January meeting and subsequent urgings reflected a mutual commitment to a good faith, longer-term turnaround of the dealership. The fraud allegation is that as of the January, 1977, meeting, Basic/Four had decided to turn the St. Louis market into a branch sales operation and that Basic/Four deliberately and falsely induced CMS to continue as dealer until such operation was ready to be established. Although the timing and certainty of Basic/Four's plans were disputed, there is substantial evidence on which a jury could find such a fraudulent scheme: an unsuccessful search, prior to the January meeting, to find a replacement for CMS; a senior-level determination to locate branch offices in several metropolitan markets, including St. Louis; a search for a branch manager

in mid-1977 which Basic/Four later called premature and arguably disavowed; evidence of discussions within Basic/Four regarding a willingness to increase the quota if necessary to justify termination once the branch operation was ready to be implemented; and just months before the termination, Basic/Four's specific urgings to CMS to fire certain personnel and hire new sales staff, actions which were adopted and which by their nature take time to yield results. In short, a jury could reasonably find that Basic/Four's course of conduct throughout the period from January, 1977, through the termination was calculated to induce CMS to continue as dealer and that such conduct was fraudulent from at least January onward. In other words, a jury could find that Basic/Four induced CMS to continue to absorb the start-up costs of introducing the products (in expectation of a longer-term turnaround) while Basic/Four intended to terminate CMS and establish an in-house operation.

There simply is no merit to Basic/Four's claims that a finding of materiality, reliance and proximate cause is precluded because CMS merely performed as it was required to perform under the dealership contract. As of January, 1977, CMS had lost over $180,000 and had an arguable legal right to get out of the dealership at that point. *See, e.g., Feld* v. *Henry S. Levy & Sons, Inc.*, 37 N.Y.2d 466, 373 N.Y.S.2d 102, 335 N.E.2d 320 (1975); *Bloor* v. *Falstaff Brewing Corp.*, 601 F.2d 609, 612-613, n.7 (2d Cir. 1979). If CMS knew that Basic/Four intended to install a branch operation in St. Louis, CMS almost certainly would have sought to terminate. We need not and do not hold that

CMS had an indisputable right to terminate on these grounds, but there certainly is more than a colorable basis for doing so. The jury, thus, could find that the entire sixteen-month continuation would not have occurred but for the fraudulent misrepresentations.[10]

We recognize that a jury might have found that some of the parties' conduct between January, 1977, and the termination effectively put CMS on notice as to Basic/Four's intentions or otherwise made reliance unreasonable in whole or in part. The evidence is mixed, however, and we cannot say it is so one-sided that it compels a judgment for Basic/Four as a matter of law. These issues have been vigorously litigated and twice submitted to juries which on both occasions found Basic/Four liable for fraud and awarded very similar amounts in actual damages—$73,000 in the first trial and $78,000 in the second. Such determinations will not lightly be set aside, especially upon appellate review.

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10. There is no merit to the contention that because the initial three-year period of the dealership expired, a new contract was formed which somehow cut off the fraud claim as a matter of law. The contract renewed automatically absent notice to the contrary. Thus, it operated as an extension of the agreement and not formation of a wholly new contract and, in any event, Basic/Four never sought to terminate under the renewal clause. Nor does the "risk" of nonrenewal defeat, as a matter of law, the claim that CMS relied upon fraudulent inducements to continue the relationship. Here, CMS contends that Basic/Four waived its right to terminate on quota grounds and falsely induced CMS to believe that the relationship would continue in good faith in an attempt to establish a successful dealership. If, as the jury found, CMS believed and relied in this manner, it is at least reasonable to find that CMS also believed Basic/Four would not suddenly terminate under the nonrenewal clause. Moreover, the nonrenewal clause presented a potential opportunity for *either* party to terminate and the existence or non-exercise of such opportunity is simply another factor for the jury to consider in determining the reasonableness of reliance.

Basic/Four also contends that the jury instructions with respect to liability were erroneous and prejudicial. We disagree. The district court followed Missouri Approved Instructions (MAI). *See Scott* v. *Conroy*, 577 F.2d 13, 16, n.2 (8th Cir. 1978). As the court noted, the principal purpose in doing so was to simplify the framework of issues for the jury and allow the parties to more fully set forth their respective positions within such framework. As to the estoppel claim, the instructions directed the jury to decide the factual disputes which were critical to recovery, *e.g.*, whether Basic/Four engaged in certain conduct and made certain representations, as alleged; whether such conduct induced CMS reasonably to believe that the contract would not be terminated on quota grounds; and whether CMS relied on Basic/Four's statements and acts and, in so doing, used ordinary care.

The foregoing instructions adequately presented the estoppel issue as it has been formulated under Missouri law. Missouri courts have held that "the substance of estoppel is the *inducement* of another to act to his prejudice." *White* v. *Smith*, 440 S.W.2d 497, 504 (Mo. App. 1969) (emphasis in original, citations omitted). This issue was squarely submitted. The Missouri cases consistently construe an estoppel claim to have three elements: (1) an act or statement inconsistent with the right later asserted; (2) reliance on such act or statement; and (3) injury. *See, e.g., Chrysler Credit Corp.* v. *Friendly Ford, Inc.*, 535 S.W.2d 110, 112 (Mo. App. 1976) (citations omitted). Here, the issues of reliance, injury and the basic facts giving rise to the estoppel were expressly submitted under the instructions. The

court did not expressly instruct as to the nature of the inconsistency element, but we find no prejudice in this respect. The nature of the inconsistency was self-evident and fully litigated by the parties: Were Basic/Four's conduct and statements consistent with its actions under the termination clause or did such conduct waive its rights under that clause? To state the issue is to state the inconsistency. Moreover, a finding of inconsistency was a necessary, albeit implicit, element of the instructions. For the jury to find for CMS, it specifically had to find that Basic/Four's conduct induced CMS to reasonably believe it would not be terminated under the quota clause. Such a finding necessarily implies that Basic/Four's conduct was not consistent with terminating CMS under that clause. Under these circumstances, the failure to expressly instruct as to inconsistency did not prejudice Basic/Four and is not reversible error. *Cf. Hinkeldey* v. *Cities Service Oil Co.*, 470 S.W.2d 494, 502 (Mo. 1971) (not every controverted element need be instructed upon when it is established as a matter of law).[11]

Basic/Four also asserts it was error not to instruct that the estoppel-creating conduct must be "absolute and unequivocal;" that opinions and inferences are insufficient to establish estoppel; and that conduct susceptible of two constructions, one of which is consistent with the right sought to be estopped, does not form an estoppel. There is some support in Missouri case law for consideration of these factors. *See Peerless Supply Co.* v. *Industrial Plumb-*

11. We do not suggest that an estoppel was established as a matter of law. The nature of the inconsistent acts, however, was factually established such that the only issue was the effect of such acts in terms of inducement and reliance.

ing & Heating Co., 460 S.W.2d 651, 667 (Mo. 1970). The court, in its discretion, might well have instructed the jury that in determining inducement and reliance, it should consider such factors.[12] The only elements consistently held to be necessary to an estoppel claim, however, relate to the estoppel-creating facts, inducement and reliance, elements on which the court did instruct the jury. *See id.* at 666; *Chrysler Credit Corp.* v. *Friendly Ford, Inc., supra*, 535 S.W.2d at 112; *White* v. *Smith*, 440 S.W.2d 497, 503-504 (Mo. App. 1969). We cannot say that the district court omitted elements that are clearly required under Missouri law, nor that, read as a whole, the instructions misled or confused the jury or otherwise failed to present the issues necessary to their verdict.

As to the fraud claim, the court instructed that to find for CMS, the jury must find (a) that Basic/Four represented to CMS that it would continue as dealer, intending CMS to rely thereon; (b) that such representation was false and Basic/Four knew it was false when made; (c) that the representation was material to CMS in making expenditures for the selling of Basic/Four's products; (d) that CMS relied on such representation and, in so doing, used ordinary care; and (e) that CMS was injured as a direct result of such representation. This instruction plainly covers the elements that are essential to a fraud claim under Missouri

12. Basic/Four did not submit simple, neutral instructions in this regard. It submitted argumentative instructions which required unjustified commentary on the evidence and which all but directed a verdict in favor of Basic/Four. The district court was well within its discretion in rejecting such submissions. *See, e.g., Barnes* v. *Marshall*, 467 S.W.2d 70, 78-79 (Mo. 1971) ("instructions shall be simple, brief, impartial, free from argument").

law and that were in dispute here. *See, e.g., Walsh* v. *Ingersoll Rand Co.*, 656 F.2d 367, 369 (8th Cir. 1981); *Slater* v. *KFC Corp.*, 621 F.2d 932 (8th Cir. 1980).

Basic/Four contends it was reversible error not to instruct that an additional required element was CMS's lack of knowledge as to the falsity of Basic/Four's representation. The "hearer's ignorance of falsity" is an element of fraud. *See, e.g., Slater* v. *KFC Corp., supra*, 621 F.2d at 936. Here, however, that issue was not in dispute. No one contends that as of the January, 1977, meeting (at which Basic/Four represented that it wanted CMS to continue as dealer) CMS had knowledge of Basic/Four's plan to establish a branch operation or otherwise knew that the representation at that meeting was false. Basic/Four's claim as to CMS's knowledge actually relates to reliance, *i.e.*, that the subsequent conduct at some point put CMS on notice as to Basic/Four's true intentions or, at least as to the possibility Basic/Four would terminate on quota grounds. Because there was no claim that CMS had knowledge of falsity at the time of the representation, we cannot find that omitting an instruction on that element was prejudicial to Basic/Four. *See Gottlieb* v. *Hyken*, 448 S.W.2d 617, 620 (Mo. 1970) (facts not in dispute need not be included in instructions).

Basic/Four also complains that the fraud instructions did not define "reliance" and did not address a number of factors which weigh against a finding of reasonable reliance, *e.g.*, that written assertions of a right to terminate on quota grounds may outweigh contrary oral representations; that the possibility of nonrenewal under the contract may

affect the extent of reliance which would be deemed reasonable; and that a representation is not the proximate cause of injury if the injuries would have occurred regardless of the representation. These factors are not essential legal elements of a fraud claim but rather are evidentiary factors bearing on the reasonableness of reliance. The significance of these factors was fully argued to the jury by the parties. In our view, had Basic/Four requested a simple, neutral instruction directing the jury to consider such factors, the district court should have given such an instruction. Basic/Four did not do so, however. It submitted an extensive list of highly argumentative instructions which effectively required unjustified commentary on the evidence and which were virtually verdict-directing in their character. It was well within the district court's discretion to reject such submissions. *See, e.g., Barnes* v. *Marshall,* 467 S.W.2d 70, 78-79 (Mo. 1971); *Gottlieb* v. *Hyken,* 448 S.W.2d 617, 620 (Mo. 1970); *Wright* v. *Farmers Co-Op of Arkansas and Oklahoma,* 620 F.2d 694, 696-697 (8th Cir. 1980) (in diversity, state law controls the substance of jury instructions, but the grant or denial of an instruction is a procedural matter for determination under federal law).

In sum, as to both the fraud and contract claims, the district court properly submitted to the jury—in simple, neutral terms—all of the ultimate factual issues which were necessary to the jury's determination of CMS's claims under Missouri law. The parties, in developing the evidence and in presenting closing arguments, clearly presented their positions on how the details of their dealings bear on the question of estoppel, fraud and, in particular, on the reason-

ableness of reliance. Twice juries have found for CMS on both claims. We cannot say that such findings are against the weight of the evidence, wrong as a matter of law, or attributable to erroneous instructions on the controlling legal principles. The instructions were consistent with MAI practice and there is no showing that the jury was misled or confused. Accordingly, we cannot say the district court erred in upholding the jury's finding of liability.

The only remaining issue is damages. The district court ruled that the benefit-of-the-bargain rule of damages is controlling, but the theory actually pursued was a reliance or out-of-pocket loss theory. In reviewing the damage award, we look to the evidence actually adduced, the instructions actually given and the award actually made—not to labels or rationalizations offered outside the trial itself.

Both parties litigated damages on an out-of-pocket loss theory. CMS introduced no evidence of future profits and sought no recovery on such a basis. It introduced evidence detailing its specific costs and overhead allocations as well as its revenue from sales of hardware and software services. Basic/Four's evidence essentially consisted of disputing whether certain expenditures were sound, whether certain overhead was properly allocable to the dealership and, more generally, whether CMS's losses were due to its own ineptness and failures rather than to reasonable business practices. The jury instructions were very simple: on the contract count, the jury was directed to award "such sum as you believe will fairly and justly compensate plaintiff for any damage you believe plaintiff sustained as a direct result of such breach of contract;" and as to fraud, to award "all

amounts as shown by the evidence which are the direct and actual consequence of plaintiff having acted on the truth on such representation." *See Jurcich* v. *General Motors Corp.*, 539 S.W.2d 595, 601 (Mo. App. 1976). These general directions, in tandem with the parties' development of the case, make clear that the damages were to be measured on an out-of-pocket loss basis. Moreover, because the jury awarded as actual damages almost precisely the net loss figures proffered by CMS, it is also clear that the jury rejected Basic/Four's contentions.

Most of Basic/Four's assertions relating to damages are an attempt to relitigate fact questions which the jury resolved against it. The district court found no compelling reason to set aside those determinations; nor do we. Apart from such matters, Basic/Four contends that the district court should have given more specific guidance to the jury in measuring damages. Missouri law, however, expressly permits the use of the generalized instruction given in this case when, as here, the parties have clearly presented the nature of the dispute as to damages. *See, e.g., Boten* v. *Brecklein*, 452 S.W.2d 86, 93 (Mo. 1970). On this record, there is not doubt that if out-of-pocket losses are a proper theory of recovery, then damages were properly submitted and the award made was a reasonable one.

Basic/Four contends that the award should be set aside because it does not reflect the traditional benefit-of-the-bargain measure which is the general rule in Missouri. *See, e.g., Slater* v. *KFC Corp., supra; Smith* v. *Tracy*, 372 S.W.2d 925, 938 (Mo. 1963). Missouri courts, however, have permitted alternative measures of damages when the "bargain

theory" measure, "because of the peculiar circumstances of the case involved," would not accurately measure the loss sustained. *Schroeder* v. *Zykan*, 255 S.W.2d 105, 110 (Mo. App. 1953); *see also Hough* v. *Jay-Dee Realty and Investment, Inc.*, 401 S.W.2d 545 (Mo. App. 1966); *Security Stove & Mfg. Co.* v. *American Ry. Express Co.*, 227 Mo.App. 175, 51 S.W.2d 572, 573, 576 (1932). In our view, the present case is just such a "peculiar" one in which the out-of-pocket loss theory is appropriate.

As to fraud in a transaction, the typical "bargain theory" measure is the difference between the actual value and the represented value of the subject of the transaction. *See Smith* v. *Tracy, supra*, 372 S.W.2d at 938. Such a measure simply makes no sense in this case, given the nature of the fraud. Basic/Four did not make representations as to specific values or as to particular facts directly relating to such values. It fraudulently induced CMS to continue as a dealer and the harm from such continuation is best measured by the net losses incurred as result of it.

The contract count is a quite different theory. The essence of that claim is wrongful termination—that quite apart from the fraudulent inducement to continue, CMS did continue and was wrongfully prevented from reaching the recoupment or turnaround point. In effect, the claim is that Basic/Four appropriated the benefit of CMS's efforts to introduce the product, leaving CMS to incur the start-up costs without the longer term return. Lost profits might ordinarily be the proper measure for recovery but, here, the dealership had only operated for a few years, had yet to reach the break-even point and profit margins were not

susceptible to precise measurement. Although a lost-profits theory might often result in a larger recovery than under the out-of-pocket theory, here, lost profits might well be speculative. The more certain measure which comes closest to putting CMS where it would have been but for the breach is the out-of-pocket loss theory. *See Restatement of Contracts* (First) § 333, comment (b). Thus, in our view, the damage award was based on a proper theory.

As to punitive damages, Basic/Four disputes the adequacy of the instructions and the propriety of the $390,000 award. Neither contention is persuasive.

The court instructed that if the jury found for CMS on the fraud claim, then it "may" award punitive damages if the fraud was "wilful, wanton or malicious." The instructions also defined "malice" as the "doing of a wrongful act intentionally without just cause or excuse." The court also admonished the jury, in a more general instruction, not to let passion, prejudice or sympathy enter into their deliberations. This instruction expresses the proper standard under Missouri law. *See, e.g., Beggs* v. *Universal CIT Corporation,* 409 S.W.2d 719, 722 (Mo. 1966).

There is no merit to the claim that by using the disjunctive "or" between the terms "wilful, wanton or malicious," the jury was instructed to award punitive damages simply upon finding that Basic/Four's misrepresentations were made knowingly. The instruction must be read as a whole and doing so leaves no doubt that the jury was instructed that it must find legal malice before awarding punitive damages. *Cf. Wright* v. *Farmers Co-Op of Arkansas and Oklahoma, supra,* 620 F.2d at 697 (reviewing

court must read and consider the charge as a whole and a single error may be cured by consideration of the entire charge).

Nor was Basic/Four entitled to an instruction that a good faith exercise of a contract right cannot give rise to punitive damages. This proposition has support in the abstract under Missouri law. *See Pollock* v. *Brown,* 569 S.W.2d 724 (Mo. 1978). The fraud issue here, however, focuses on the inducement, in January, 1977, and thereafter, of continued efforts by CMS when Basic/Four had already decided to establish branch operations in St. Louis. Whether the fraud at that time was intentional and without just cause is the key inquiry, not Basic/Four's state of mind as of the termination. If the jury believed CMS's theory that Basic/Four had made the branch operation decision by January, 1977, the false inducement to continue and subsequent termination when the branch was set up could not have been in good faith.

Finally, Basic/Four was not entitled to an instruction that punitive damages are disfavored in the law. This may be true and it may affect a court's assessment of the reasonableness of a punitive award, but Basic/Four points to no Missouri rule or case requiring instruction on the point. Moreover, as we have noted, "[u]nder Missouri law, the question of whether or not punitive damages shall be awarded and, if so, in what amount, rests peculiarly in the discretion of the jury." *Northern* v. *McGraw-Edison Co.,* 542 F.2d 1336, 1349-1350 (8th Cir. 1976) (citations omitted). Here, the district court found that the punitive award was not excessive and was justified by the evidence. We agree.

Two juries have rendered verdicts in this case, the first awarding $750,000 in punitive damages and the second, $390,000 in such damages. Basic/Four has failed to show why the latter verdict is so unreasonable or grossly disproportionate to the actual injuries that it must be set aside.

Thus, we find no merit to Basic/Four's claims of error in connection with the second trial and, accordingly, a third trial would not be warranted on the basis of such contentions. The only error was the partial reduction in the verdicts returned in that trial. CMS's petition for mandamus is therefore granted and the district court is directed to enter judgment in favor of CMS in the full amount of the verdicts returned in the second trial.

Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 81-1984 September Term 1982

Petition for Writ of Mandamus

In Re: Central Microfilm Service Corp.,
a Missouri corporation,
Petitioner.

The Court, having considered respondent's petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied.

October 26, 1982

Opinion of the District Court

IN THE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

[July 2, 1981]

No. 78-550C (A)

CENTRAL MICROFILM SERVICE CORP., a Missouri corporation,

Plaintiff,

vs.

BASIC/FOUR CORPORATION, a Delaware corporation,

Defendant.

MEMORANDUM AND ORDER

This matter is before the Court on the motion of defendant, Basic/Four Corporation, for judgment notwithstanding a verdict rendered April 13, 1981, or in the alternative for a new trial.

The parties refer the Court to memoranda. Upon careful consideration of these memoranda and the evidence the Court finds that while defendant is entitled to neither judgment notwithstanding the verdict nor a new trial, defendant is entitled to a reduction of the judgment.

The background facts are as follows:

On or about February 27, 1975, the parties entered into a Dealership Agreement (hereinafter referred to as Agreement) by which defendant appointed plaintiff to be its exclusive dealer for Basic/Four computer systems in eastern Missouri and southern Illinois. The Agreement was to run for three years, with automatic renewal under Section 5B for one-year terms if neither party gave specified notice. Defendant also reserved the discretionary right to cancel the Agreement at any time under Section 6 if plaintiff did not meet specified six-month sales quotas.

Plaintiff never met its six-month quotas. Both parties considered termination or modification of the Agreement during its initial three-year period, but neither party gave notice of non-renewal prior to February 27, 1978. On or about January 6, 1977, December 15, 1977, and December 28, 1977, the parties held meetings to discuss their relationship. On May 19, 1978, defendant canceled the Agreement under Section 6 for plaintiff's failure to meet the latest six-month sales quota.

In this lawsuit the parties disputed the legal effect of the aforementioned meetings and related conduct on the Agreement. Plaintiff alleged in Count III that by its conduct defendant became estopped from asserting its right to terminate the Agreement under Section 6 for failure to meet sales quotas. Plaintiff alleged in Count V that on January 6, 1977, defendant fraudulently induced it to continue its distributorship relation with defendant.

On April 13, 1981, a jury awarded plaintiff $182,000.00 on Count III and $78,000.00, plus $390,000.00 in punitive dam-

ages, on Count V. Judgment was entered accordingly, plus interest and costs.

Defendant moves for judgment notwithstanding the verdict in Count III on the grounds that plaintiff did not show a "clear and unequivocal act" by which defendant waives its Agreement right, that plaintiff did not establish the three elements of equitable estoppel, that even if plaintiff demonstrated estoppel defendant revoked same, and that plaintiff cannot recover under Count III as a matter of law. In the alternative defendant requests a new trial on Count III on the grounds that by denying specific jury instructions the Court improperly "allowed the jury to find liability on the basis of conduct expressly authorized by the Agreement * * *" (Defendant's Memorandum in Support * * * at 40), that Jury Instruction No. 5 gave inadequate guidance for application of the appropriate measure of damage, and that the jury's damage award of $182,000.00 was grossly excessive.

Defendant moves for judgment notwithstanding the verdict on Count V on the grounds that plaintiff did not establish the substantive elements of fraud (actionable misrepresentation, reasonable reliance, materiality, proximate cause, and damage). In the alternative defendant requests a new trial on Count V on the grounds that the verdict was against the clear weight of evidence, that the jury instructions improperly set forth critical elements of fraud, and that the Court improperly refused certain instructions.

Rule 61 of the Federal Rules of Civil Procedure provides:

> "No error in either the admission or the exclusion of evidence and no error or defect in any ruling or

> order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

The Eighth Circuit in *Davis* v. *Burlington Northern*, 541 F. 2d 182, 186 (8th Cir.), *cert. denied* 429 U. S. 1002 (1976), in determining a motion for judgment notwithstanding the verdict, said:

> "[The District Court] must view the evidence in the light most favorable to sustaining the jury's findings and must give the prevailing party the benefit of every reasonable inference which may be drawn from the evidence. Judgment notwithstanding the verdict must be granted if the evidence, so viewed, was such that reasonable men could not differ as to the conclusion that the plaintiff's proof had failed to meet its burden as to an essential element of the cause of action." (Citations omitted.)

With respect to Count III defendant contends that plaintiff did not prove that it waived its rights to terminate the Agreement. However, defendant's "course of performance" of the Agreement is relevant evidence of waiver "of any term inconsistent with such course of performance." R. S. Mo. 400.2-208(3). Given the fact that defendant's conduct regarding enforcement of termination provisions

was ambiguous at best this Court cannot find as a matter of law that defendant did not waive those rights.

Defendant contends further that plaintiff did not prove the three elements of equitable esoppel. In *Chrysler Credit Corp.* v. *Friendly Ford,* 535 S. W. 2d 110, 112 (Mo. App. 1976), the Court said:

> "Three elements must be clearly established by a party seeking to assert an equitable estoppel: (1) an admission, statement or act inconsistent with a claim afterwards asserted or sued upon; (2) action by the other party in reliance on such admission, statement or act; and, (3) injury to such other party if the first party is allowed to contradict or repudiate such admission, statement, or act."

This Court finds that defendant's conduct at the December, 1977 meetings (at least) was inconsistent with defendant's public search for a branch manager, defendant's internal memoranda, Nicholson's grudging support of plaintiff, and the termination in May of 1978. Reliance and injury were also clearly shown by the evidence.

Defendant contends that it asked plaintiff to do nothing it was not already obliged to do under the Agreement. Under Section 10 of the Agreement plaintiff had to "use its best efforts to promote the sale and distribution of Products * * * and to provide adequate support * * *," including maintenance of "appropriate, attractive and accessible premises and facilities * * * for the display and demonstration of Products" and maintenance of "an adequate, trained sales force * * *." The Agreement provided further:

> "C. The Seller's representatives may periodically visit the Dealer and advise on methods and means best suited to promoting sales.

"D. The Dealer's marketing procedures shall meet all reasonable standards of the Seller."

This Court cannot find, as a matter of law, that in 1977 defendant simply "advised" plaintiff that its "reasonable" standards required plaintiff's "best" efforts to include certain operational changes in order to provide "adequate" support, "appropriate" facilities, and an "adequate" sales force. Given the obvious breadth of these adjectives (drawn from the Agreement) and defendant's economic leverage in the Agreement no-fault cancelation provision (§5B) as of December, 1977, this Court must leave the jury's view of defendant's conduct intact.

Defendant contends further that if it did waive its contractual termination rights by its "course of performance" then it revoked the waiver by repeatedly affirming its right to terminate. However, a waiver has no legal effect if "the retraction would be unjust in view of a material change of position in reliance on the waiver." R. S. Mo. 400.2-209(5). Inasmuch as the evidence shows that plaintiff materially changed its marketing efforts in reliance on defendant's requests it would now be unjust to permit a waiver revocation.

Defendant objects to any recovery by plaintiff under Count III because Missouri cases otherwise similar to that at bar have involved contracts terminable at will rather than contracts for a fixed term. *Lockewill* v. *United States Shoe Corp.*, 547 F. 2d 1024 (8th Cir. 1976), cert. denied 431 U. S. 956 (1977), *Gibbs* v. *Bardahl Oil Co.*, 331 S. W. 2d 614 (Mo. 1960). Noting that the results of wrongful termination decisions "have not been harmonious" the Court in

Lockewill, at 1028, cited Williston on Contracts §1017A (3rd Ed. 1967 & Supp. 1980) to analyze this area of the law, and said:

> "[T]he problem may present itself to a Court in any one of five conventional situations: (1) where the duration of the contract is fixed; (2) where a determinable time is fixed on one side only; (3) where the contract is completely silent as to termination; (4) where the contract is definite as to duration but reserves to one side a right of prior cancellation; and (5) where the contract fixes no definite period of duration but specifies that one or both parties may cancel at will or upon notice, or upon written notice, or for designated cause, or for dissatisfaction."

While *Lockewill* concerned the third situation, the instant case presents the fourth:

> "(4) Where the Agreement, otherwise sufficiently definite as to duration, reserves to one of the parties a right of prior cancellation. * * * An express provision for termination at will renders his promise illusory and unenforceable *so far as it is executory*. Where the right to terminate is exercised, there can be no action for breach of contract since the agreement itself provides for its cancellation; * * *."

Williston, §1017A, at 153-54 (emphasis added). This Court finds that defendant's discretionary right to terminate the Agreement under Section 6A(2)(d) thereof rendered its promise to perform the Agreement illusory and unenforceable to the extent that plaintiff had not actually performed. Accordingly, the Court finds that the Agreement's fixed term does not bar plaintiff's recovery.

Defendant contends that plaintiff may not recover under Count III because plaintiff could not reasonably have held expectations of profit from full performance of the Agreement. This is speculative, however, inasmuch as the record could reasonably be read to show that defendant sabotaged plaintiff's performance by indiscreetly searching for a branch manager, grudgingly supporting plaintiff, et cetera.

Defendant contends that plaintiff may not recover damages incurred prior to the renewal period of the Agreement (commencing February 27, 1978) under Count III. In defendant's Memorandum in Support of its motion, at 37-38, it is stated:

> "The agreement resulting from such renewal constitutes 'a new contract' for the renewal period and not a mere continuation of the old. This conclusion is particularly required here, considering that B/4 had the absolute right (regardless of cause) to terminate the dealership as of the end of the three-year term of the first Agreement * * * in which event plaintiff would have had no cause of action." (Citations omitted.)

Defendant's reference to the original and renewal periods in determining damages is inappropriate, however, because plaintiff is not here challenging defendant's right to prevent automatic renewal of the Agreement under Section 5B, but is challenging defendant's distinct right to terminate the Agreement under Section 6A(d) for failure to meet quota. Accordingly, defendant's "forebearance" with respect to the no-fault termination provisions of Section 5B of the Agreement is gratuitous and is legally irrelevant to defendant's exercise of the Section 6 quota termination clause. Inasmuch as the record showed ambiguous conduct

by defendant as early as January, 1977, this Court cannot disturb the jury's award of damages for a period prior to February, 1978.

In *Lincoln Carpet Mills* v. *Singer Co.*, 549 F. 2d 80 (8th Cir. 1977), the Eighth Circuit discussed the proper standard for determination of motions for a new trial, and said, at 81-82:

> "A motion for new trial is addressed to the sound discretion of the trial court and its decision thereon should not be upset absent a strong showing of abuse. In ruling on a new trial motion, the trial court, after reviewing all of the evidence, must exercise its independent judgment in determining whether the verdict was against the clear weight of the evidence." (Citations omitted.)

While the Court is not bound to draw inferences in plaintiff's favor, it cannot grant a new trial because other results are simply plausible or more reasonable. *Fireman's Fund Insurance* v. *Aalco Wrecking*, 466 F. 2d 179, 186 (8th Cir. 1972). As noted previously, Federal Rule of Civil Procedure 61 provides that "no error or defect in any ruling or order or in anything done or omitted by the court * * * is ground for granting a new trial * * * unless refusal to take such action appears to the court inconsistent with substantial justice."

Defendant requests a new trial on the ground that by denying specific jury instructions the Court improperly permitted the jury to compensate plaintiff for conduct required by the Agreement. Defendant would have the Court give additional instructions to the following effect:

"a. The conduct or representation on which the alleged estoppel is based must be absolute and unequivocal;

"b. The conduct or representation on which the alleged estoppel is based must be inconsistent with the subsequent exercise of the right to terminate;

"c. Mere argument, inference or expression of opinion cannot support a finding of estoppel;

"d. Conduct or representation which is susceptible of two interpretations, one of which is consistent with B/4's not surrendering the right to terminate for failing to attain quota, cannot constitute estoppel;

"e. Mere silence, inaction or forbearance will not work an estoppel unless there is a duty to speak or unless silence, inaction or forbearance is the result of culpable negligence or is done with the intention or expectation that plaintiff would act in reliance thereon;

"f. Statements by B/4 that it reserved its right to terminate for future failures to attain quota preclude a finding of estoppel;

"g. Statements or conduct by plaintiff after B/4's failure to exercise its right to terminate, which indicate that plaintiff believed that B/4 retained the right to terminate, or was considering termination, preclude a finding of estoppel;

"h. Representations or conduct which induced plaintiff merely to perform in accordance with its contractual obligations cannot form the basis for an estoppel;

"i. The jury may not find for plaintiff without finding that B/4, in expressing its desire for continuation of plaintiff's dealership, represented that it wanted plaintiff to continue as its dealer for an indefinite period; and

"j. Conduct subsequent to, superseding and contrary to the acts referred to in the instruction constitute a revocation of any estoppel and thus require a verdict for B/4." (Deft's Memorandum in Support of Motion, at 39-40.)

While this Court is not bound to use Missouri Approved Instructions (hereinafter referred to as MAI) in diversity cases, *Wright* v. *Farmers Co-op of Arkansas and Oklahoma,* 620 F. 2d 694 (8th Cir. 1980), *Scott* v. *Conroy,* 577 F. 2d 13 (8th Cir. 1978), this Court chose to use MAI and so informed the parties early in this litigation. In spite of this request, defendant repeatedly proposed instructions which were argumentative, which sought judicial commentary upon the evidence, and which were written with complex, condescending prose. Defendant now contends that this Court's duty to properly instruct the jury, *Dulin* v. *Circle F Industries,* 558 F. 2d 456, 469 (8th Cir. 1977), required this Court to give its instruction in one form or another.

While the Court recognizes defendant's right to jury instructions presenting its theory of the case, instructions must ultimately facilitate "an intelligent understanding of the legal and factual issues * * *." *Dulin,* 558 F. 2d at 469. Upon careful consideration of the parties' lengthy, detailed trial presentations, the parties' complex proposed instructions, and the Court's experience with the first trial of this lawsuit, the Court determined that neutral, simple instructions would better insure an intelligent disposition of the case. Inasmuch as the parties were given ample opportunity to present their theories of the case to the jury during closing argument, the Court cannot find that its election

to keep instructions simple prevented "substantial justice," F.R.C.P. 61, if said election hindered justice at all.

With respect to defendant's specific requests, the Court finds as follows:

Defendant's complaint regarding item a (quoted above) is that without a special "clear and unequivocal" instruction the jury might equate forebearance with estoppel. Defendant contends that it merely urged plaintiff to comply with its antecedent contract obligations, not to adopt new duties. As noted previously, however, this contention is debatable. Furthermore, Missouri courts describe estoppel conduct not as an "absolute and unequivocal" representation but as a clear "admission, statement or act inconsistent with a claim afterwards asserted * * *." *Chrysler Credit*, 535 S. W. 2d 110, 112. Given the debatable nature of defendant's contention and the state of Missouri law, this Court finds that item a is a more appropriate subject for closing argument than jury instruction, and that the jury's verdict rendered without an instruction on item a is neither against the clear weight of evidence nor the result of any gap in instructions on the law.

Instructions on items b and h would be argumentative in that they implicitly justify defendant's conduct by the Agreement. Item c would be inappropriate because it characterizes defendant's statements as "mere argument, inference or expression of opinion." Item d supplants the jury's right to determine the credibility of witnesses. Item e is unnecessary in that the evidence clearly showed not silence or forbearance but affirmative statements, conduct and responses by both parties. The issues were not whether

certain steps were taken, but the legal effect of those steps. Items f and g are argumentative in that they draw inferences from ambiguous conduct.

An instruction on item i would merely duplicate portions of the Count III verdict-director, and do so in an argumentative manner. An instruction on item j is inappropriate for reasons previously set forth.

Defendant contends that Instruction No. 5 (MAI 4.01 modified) gave the jury insufficient guidance as to the precise measure of damages. Missouri courts have interpreted MAI 4.01 as follows:

> "It is a short, simple, general instruction which directs an award which will fairly compensate plaintiffs for their damages. It is contemplated by MAI that where a general instruction of this kind is given the jury will be properly advised by the argument concerning details. If the attorneys disagree as to the elements of and proper measure of damages any questions raised should be settled by the court either at the instruction conference or by its rulings upon objections made during the course of the argument."

Boten v. *Brecklein*, 452 S. W. 2d 86, 93 (Mo. 1970), *Morgan* v. *Wartenbee*, 569 S. W. 2d 391, 395 (Mo. App. 1978), *North County School District* v. *Fidelity & Deposit Co.*, 539 S. W. 2d 469, 479-80 (Mo. App. 1976). This Court finds that MAI 4.01, as modified, coupled with the parties' closing arguments, did set forth sufficient guidance as to damages. As with the evidence on liability, the damage evidence of both parties was long, detailed, and complex to the point that this Court determined that long, detailed and complex jury instructions would hinder an intelligent disposition of the

case. Inasmuch as damage issues were well covered during closing argument, this Court cannot find a failure of substantial justice.

Defendant contends that the damage award under Count III of $182,000.00 was excessive because plaintiff lost substantial sums through erroneous pricing policies on computer software, through a failure to bill for computer time used by plaintiff's sister companies, and through expenses improperly allocated to plaintiff from its sister companies.

In *Solomon Dehydrating Co.* v. *Guyton,* 294 F. 2d 439 (8th Cir.), cert. denied 368 U. S. 929 (1961), the Eighth Circuit made this emphasis, at 447-48:

> "[I]n our opinion, inadequacy or excessiveness of a verdict is basically, and should be, a matter for the trial court which has had the benefit of hearing the testimony and of observing the demeanor of the witnesses and which knows the community and its standards; that this is a responsibility which, for better working of the judicial process and for other seemingly obvious reasons, is best placed upon its shoulders; and that we shall continue to consider review, as we have said before, not routinely and in every case, but only in those rare situations where we are pressed to conclude that there is 'plain injustice' or a 'monstrous' or 'shocking' result."

With respect to software pricing policies, the Court cannot agree with defendant in Count III. Credible evidence showed that from April 1, 1975, through January 6, 1977, plaintiff had software sales of $21,139.00 against costs of $3,206.00 for a profit of $17,933.00. *See* Ex. 225A-2. Whatever plaintiff's shortcomings, the Court cannot dis-

turb the jury's award in Count III in the face of evidence that software services were profitable.

With respect to the computer pricing and expense allocation the evidence was not clear cut. Because these issues were thoroughly presented by the parties in their trial presentations and closing arguments and because there was sufficient evidence to justify either a substantial or a nominal verdict (as credibility permitted) the Court cannot here find injustice with respect to those elements of damage.

Defendant moves for judgment notwithstanding the verdict on Count V on the ground that plaintiff did not establish substantive elements of fraud. These elements were set forth in *St. Louis Union Trust* v. *Merrill Lynch, Pierce, Fenner & Smith,* 562 F. 2d 1040 (8th Cir. 1977) as follows, at 1054:

> "[A] representation; its falsity; its materiality; the speaker's knowledge of the falsity or his ignorance of its truth; the speaker's intent that his statement should be acted upon by the person and in the manner reasonably contemplated; the hearer's ignorance of the falsity of the statement; his reliance on its truth; his right to rely thereon; and his consequent and proximately caused injury."

With respect to actionable misrepresentations defendant contends that its promise of January 6, 1977, to maintain plaintiff as dealer was a promise to perform a future act rather than an actionable misrepresentation of a present or pre-existing fact. *Godwin* v. *Dinkler St. Louis Management,* 419 S. W. 2d 70, 71 (Mo. 1967). This contention was rejected, however, in *Schimmer* v. *H. W. Freeman Construc-*

tion, 607 S. W. 2d 767, 769-70 (Mo. App. 1980), which noted that "to the extent that [*Reed* v. *Cooke*, 331 Mo. 507, 55 S. W. 2d 275, 278 (banc 1932)] and [*Riss and Co.* v. *Wallace*, 239 Mo. App. 979, 195 S. W. 2d 881, 886 (1946)] hold that actual fraud cannot be predicated on unfulfilled promises or statements as to future events, they are no longer to be followed." 607 S. W. 2d at 770, *citing White* v. *Mulvania*, 575 S. W. 2d 184 (banc 1979).

Defendant contends further that because it did continue the dealer relation through and beyond the Agreement's initial three-year period, its representation of January 6, 1977, was fulfilled and, hence, was not a misrepresentation. While the Court doubts that defendant meant to continue plaintiff as dealer in perpetuity, the Court must "view the evidence in the light most favorable to sustaining the jury's findings * * *." *Davis*, supra, 541 F. 2d at 186. The Court cannot find, as a matter of law, that the effectiveness of defendant's representation of January 6th expired on May 19, 1978.

Defendant contends that plaintiff did not establish reasonable reliance upon the representation. Defendant notes evidence suggesting that plaintiff had already decided prior to defendant's representation of January 6th to remain a dealer and that defendant informed plaintiff on numerous occasions that it reserved the right to terminate the Agreement should plaintiff fail to meet quota. However, the jury found differently on April 13, 1981, and this Court cannot disagree as a matter of law. That the Fifth Circuit in *Edwards* v. *Allied Chemical*, 414 F. 2d 60 (5th Cir. 1969) affirmed a trial court finding of no reliance on a motion for summary judgment, or that the Fourth Circuit in *Call Carl*,

Inc. v. *BP Oil Corp.*, 554 F. 2d 623 (4th Cir.), *cert. denied*, 434 U. S. 923 (1977) found a lack of reliance to be an alternate ground for reversing a trial court under Maryland law, 554 F. 2d 623, 632, has no application to the instant facts.

Defendant contends further that plaintiff could not have reasonably relied on its representations when it was already obliged to take the requested actions under the Agreement. As noted previously, this contention is debatable and, as such, is more appropriately the topic of closing argument to the jury than justification to take the fact-finding function from the jury.

Defendant contends that plaintiff did not establish materiality of defendant's representation because plaintiff decided to remain as dealer prior to the representation and because plaintiff had no right under the Agreement to refuse to continue performing the Agreement. In light of this Court's strict standard for review of the evidence, however, the Court cannot accept these propositions as matters of law.

Defendant contends that plaintiff has not shown proximate cause as a matter of law. Under Missouri law plaintiff must show causation in fact. *St. Louis Union Trust*, 562 F. 2d 1040, 1054. Defendant notes specifically that plaintiff includes as damages expenses incurred in spite of defendant's conduct and that the impact of defendant's fraudulent conduct had run its course by the end of the initial three-year Agreement period.

The Court must initially determine defendant's contention that plaintiff introduced no competent evidence of damage. During the trial this Court advised the parties that

it would measure damages by the "benefit of the bargain" rule. *Slater* v. *KFC Corp.*, 621 F. 2d 932 (8th Cir. 1980). Defendant in its Memorandum in Support of Motion, at 60-61, reasons as follows:

> "In view of the applicability of the benefit-of the bargain damage measure, plaintiff's concession during the trial (Tr. 566-67) that it could not present any evidence to establish damages under the benefit-of-the-bargain rule, and plaintiff's failure to present such evidence, the proof was insufficient to establish the essential element of damages."

Defendant's complaint is that evidence of distinct expenses is irrelevant to any determination of the value of plaintiff's dealership. This contention mistakes the trees for the forest. This Court understood the parties to be proving the value of plaintiff's dealership through evidence of profit and loss, of quotas and their bases, of accounting studies, and of defendant's experience with a branch distributor in St. Louis. That the parties dwelt on the minutiae of plaintiff's dealership expenses does not, as a matter of law, detract from conclusions deduced from said minutiae and, accordingly, does not destroy the basis for a jury award.

Defendant contends that the following expenses were not proximately caused by defendant's misrepresentations: Building costs (including rent, insurance, utilities, etc.), software expenses, salaries paid to Robert Bodkin and J. Tipton, writedown of a certain Basic/Four computer, and expenses incurred complying with defendant's requests of December, 1977.

In *Jurcich* v. *General Motors Corp.*, 539 S. W. 2d 595, 601 (Mo. App. 1976), the court said:

> "The courts of this state follow the rule that in cases of fraud and deceit the defendant is responsible for those results, injurious to the plaintiff, which must be presumed to have been within defendant's contemplation at the time of the perpetration or commission of the fraud, and that plaintiff may recover for any injury which is the direct and natural consequence of plaintiff's acting on the faith of the defendant's false representations."

Inasmuch as the jury awarded plaintiff essentially all that it requested, the Court shall consider all of the aforementioned items to be part of the compensation awarded on April 13, 1981.

With respect to the rent, utilities, etc., defendant notes that plaintiff is actually one of several businesses owned and operated by Robert Bodkin and Robert France. All Bodkin-France companies, including plaintiff's dealership, paid rent, utilities, etc., to a Bodkin-France owned realty company. Defendant contends that these "costs" are actually conduits by which Bodkin and France skimmed profits from the dealership (and other entities) in the guise of expenses, and that they have no relation to actual expense incurred by Bodkin and France in running a dealership. However, defendant entered the Agreement not with Bodkin or France but with one of their business entities (Central Microfiilm Service Corporation). This Court cannot find that defendant should not have expected Central Microfilm or the dealership proper (St. Louis Information

Systems) to pay rent and other related overhead costs to some entity. There has been nothing to suggest that the Court should "pierce the corporate veil" and regard this suit as concerning Bodkin or France individually or concerning all Bodkin-France companies. Accordingly, the aforementioned building costs are compensable.

With respect to software service costs the Court finds that the jury unjustly compensated plaintiff in Count V. Credible evidence showed that from January 7, 1977, through March 31, 1979, plaintiff had sales of $170,322.00 against expenses of $210,909.00 for a loss of $40,587.00. *See* Ex. 66C-2. The credible evidence showed further that in spite of a competitive software services market and a crying need to bolster sales plaintiff invested substantial time and effort in software services. This was required neither by the Agreement nor at the request of defendant. Accordingly, the Court finds that the jury award in Count V improperly included $40,587.00 in losses for computer software services.

Defendant contends that there was insufficient documentation to justify the dealership salary of Bodkin and Tipton. While there was some question as to the appropriate value of the time and effort invested by these persons in the dealership, this question was properly before the jury and this Court cannot, as a matter of law, find that the jury erred.

Defendant contends that plaintiff's writedown of a certain demonstrator Basic/Four computer was improper. However, there was some disagreement as to the machine's usefulness and status at given points in time. This question was properly before the jury, and the jury's decision must stand.

In December, 1977, defendant suggested that plaintiff hire a new sales manager, redecorate its showroom, etc. Defendant now contends that the redecoration expenses were incurred not as a result of its representations but as a result of plaintiff's performance of the Agreement. For reasons given previously, the Court disagrees.

Defendant further contends that because plaintiff hired a sales manager from Pittsburgh, Pennsylvania, rather than hiring defendant's hand-picked candidate, the expenses plaintiff incurred moving its manager to St. Louis are not recoverable. However, this Court cannot find that plaintiff acted unreasonably by any standard in launching a region-wide search for a good manager, in hiring the particular person it did (with good credentials), and in refusing to hire the candidate sponsored by a business associate with whom problems clearly existed.

For reasons similar to its motion in the alternative for a new trial on Count III, defendant seeks a new trial on Count V. Defendant contends that the verdict is against the clear weight of the evidence, and in its Memorandum in Support of the motion, at 61-62, notes as follows:

> "The statements of B/4's representatives, construed together with the parties' writings in their obvious commercial context, do not purport to lock plaintiff and B/4 together regardless of the quality of plaintiff's performance. Rather, they reflect the desire of B/4 officials to continue the relationship, within the framework of the Agreement, as well as a hope that the dealership will prove beneficial for both companies."

Except as previously reduced, however, this Court cannot find, as a matter of law, that the verdict does not reflect a reasonable decision on the evidence presented.

Defendant contends that a new trial is necessary because the Court gave inadequate jury instructions. Defendant would have this Court give instructions to the following effect:

> "(a) that no actionable fraud can be established by a representation which merely induced plaintiff to do what it was already contractually obligated to do;
>
> "(b) that no actionable fraud can be based on an expression of expectation or hope;
>
> "(c) that B/4's subsequent exercise of its right to terminate is not proof of falsity of its earlier representation that it wanted plaintiff to continue;
>
> "(d) that an essential element is plaintiff's lack of knowledge, or lack of reason to know, that the representations in question were false;
>
> "(e) no definition of reliance was given to the jury;
>
> "(f) that no reliance may be found based on a vague oral statement in the face of a written contract and written reaffirmation clearly contrary to the oral statement;
>
> "(g) that a representation is not the proximate cause of an injury if plaintiff would have sustained the loss regardless of the representation;
>
> "(h) that a representation is not the proximate cause of an injury if plaintiff was not thereby induced to undertake actions not already required by its contractual obligations;
>
> "(i) that a representation is not the proximate cause of plaintiff's injury if B/4, after the representation, acted in a manner consistent with that representation by retaining plaintiff as the dealer beyond the end of the term of the contract;

"(j) that plaintiff cannot recover, as no evidence was presented under the 'benefit of the bargain' theory;

"(k) it provided no guidelines for determining what sum will 'fairly and justly compensate plaintiff for any damage sustained as a direct result of fraud;' and

"(l) that no damages can be awarded for the period after February 27, 1978, when a new contract existed between the parties, and after B/4 could have declined to continue by giving notice of non-renewal."

(Defendant's Memorandum in Support of Motion, at 65-68. Citations Omitted.)

For reasons given in the Court's discussion of Count III jury instructions, the Court finds that Count V instructions were proper as given. With respect to the specific requests, Items a and h are clearly argumentative, seeking to thrust defendant's theory of the case into the Court's instructions on the law. Item b would have the Court implicitly comment on the evidence, casting defendant's representations as mere expressions of "hope." Item c presents defendant's side of one of the basic issues in this case. Item d is covered in the fifth element of the Court's Count V verdict director. *See Ogilvie* v. *Fotomat Corp.*, 641 F. 2d 581, 585 (8th Cir. 1981). Item e was not necessary under the circumstances at trial. Items f, g, i, j, k and l are covered in the Court's previous discussion.

Assuming the Court erred in denying defendant's proposed instructions, the Court finds, also for reasons given in connection with Count III instructions, no prejudicial error. F.R.C.P. 61.

Defendant contends that the award of punitive damages was improper because there was insufficient evidence, because the Court's instructions on punitive damages were fatally deficient, and because the award of $390,000.00 is excessive. This Court finds, however, that the record contains sufficient evidence to justify punitive damages and that defendant's complaints about damage instructions are unfounded for reasons previously set forth. Inasmuch as punitive damages rest "peculiarly in the discretion of the jury," *Ogilvie,* 641 F. 2d at 587, the Court finds that the award is not excessive.

For the reasons given above the Court finds that plaintiff's maximum possible recovery of compensatory damages under Count V was $37,413.00. Inasmuch as the jury's punitive damage award ($390,000.00) reflects a multiple of five times the original compensatory damage award ($78,000.00) it must be recomputed to reflect the Court's adjustments. *Ogilvie.* Thus, the Court finds that plaintiff is entitled to $37,413.00 in compensatory damages and five times that amount ($187,065.00) in punitive damages under Count V. Plaintiff remains entitled to $182,000.00 in compensatory damages under Count III.

Accordingly, it is HEREBY ORDERED that defendant's motion for a new trial of Count V shall be granted should plaintiff not agree to a remittitur of the original award to $37,413.00 in compensatory and $187,065.00 in punitive damages within thirty days. In all other respects it is FURTHER ORDERED that defendant's motion be DENIED.

/s/ ROY W. HARPER

U. S. District Judge

Statutes Involved

28 U.S.C. § 1291

Sec. 1291. Final Decisions of District Courts.

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, . . . except where a direct review may be had in the Supreme Court.

28 U.S.C. § 1292

Sec. 1292. Interlocutory Decisions.

(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, . . . or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed;

(4) Judgments in civil actions for patent infringement which are final except for accounting.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate determination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

28 U.S.C. § 1651(a)

Sec. 1651. Writs.

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Supreme Court, U.S.
FILED
JAN 5 1983
ALEXANDER L. STEVAS
CLERK

No. 82-934

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BASIC/FOUR CORPORATION,
Petitioner,

vs.

CENTRAL MICROFILM SERVICE CORP.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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No. 82-934

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BASIC/FOUR CORPORATION,
Petitioner,

vs.

CENTRAL MICROFILM SERVICE CORP.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Respondent Central Microfilm Service Corp. ("CMS") prays that the Petition for writ of certiorari sought by petitioner Basic/Four Corporation ("B/4") to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this action September 24, 1982 be denied.

OPINIONS BELOW

The opinion of the Court of Appeals granting CMS's petition for writ of mandamus and directing the District Court to enter judgment in the full amount of the jury verdicts at the second trial is reported at 688 F.2d 1206 (8th Cir. 1982). It is included at pages 1-31a of the Appendix to B/4's petition. The opinion of the United States District Court denying B/4's post-trial motion

as to one claim (breach of contract) and ordering a remittitur or in the alternative a third trial as to the other claim (fraud) is not officially reported and is included at pages 33a to 56a of B/4's Appendix. The opinion of the United States District Court setting aside the verdict after the first trial and ordering a second trial is not officially reported and is set out in the Appendix hereto at pages A1-A3.

JURISDICTION

B/4 has correctly set out the jurisdictional facts and statute on which its petition for certiorari is based.

STATUTES INVOLVED

B/4 has correctly cited the statutes involved and set them out at pages 57a—58a of the Appendix to its Petition.

ISSUES PRESENTED FOR REVIEW

Whether the Court of Appeals correctly exercised its dicretionary power to review by writ of mandamus on one or more of the following grounds the order of the District Court which directed that plaintiff CMS agree to a remittitur of a sum certain or in the alternative required a third trial:

(a) The District Court's order is based on a finding of fact which is so blatantly wrong as to amount to a judicial usurpation of power;

(b) All issues but the erroneous remittitur order have been correctly resolved by two substantial verdicts for plaintiff for actual and punitive damages at two trials and by a lengthy post-trial District Court opinion after the second trial, and review by mandamus was necessary to avoid needless additional retrials which would only relitigate questions already decided.

(c) The District Court's order directing a remittitur of a sum certain or a third trial, rather than a reduced judgment which would permit an appeal, presents a question on which the Court of Appeals in the exercise of its supervisory appellate jurisdiction may properly provide guidance to the district courts.

STATEMENT OF THE CASE

At the first trial of this case, the jury returned verdicts in favor of plaintiff CMS totaling over $1,000,000. The District Court ordered a new trial. At the second trial, CMS obtained verdicts totaling $650,000. The District Court ordered a remittitur by a computed sum certain which would have reduced the judgment at the second trial to $406,478, or in the alternative required a third trial. CMS did not remit.

The remittitur order after the second trial holds as a matter of law that all CMS's computed software losses of $40,587 (plus five times this sum in punitive damages) are not recoverable because the District Court says that the Dealer Agreement between the parties does not require CMS to provide software services to customers and that B/4 did not request CMS to provide such software services. In fact, the written Dealer Agreement on its face plainly does require CMS to provide these software services and B/4 made written demands that CMS provide the software services. Thus there is no arguable rational basis for the District Court's finding of fact on which the order for a third trial squarely rests. It is the equivalent of saying that white is black when two juries have found that white is white. Moreover, the remittitur feature of the District Court's order serves no purpose but to prevent finality and appealability of the erroneous order and to require CMS to elect between foregoing its right of appeal and an expensive third trial.

The extraordinary circumstances under which the District Court entered this unusual order and the Court of Appeals exer-

cised its discretion to grant review by mandamus to avoid a third trial, and perhaps a fourth trial, are as follows:

1. Plaintiff Central Microfilm Service Corp., CMS, was a dealer purchasing and reselling B/4 computers in the St. Louis, Missouri area. CMS's Dealer Agreement is dated February 27, 1975. B/4 gave notice of termination of the Agreement in May, 1978, and immediately opened a company-owned branch sales office. CMS filed this suit June 1, 1978.

2. The first trial began April 30, 1979. It lasted nine trial days. Plaintiff CMS contended that B/4, by representation and conduct constituting estoppel and breach of contract (Count III) and fraud (Count V), induced CMS to expend the money necessary to introduce B/4's computer products into the St. Louis marketplace and then B/4 wrongfully terminated the dealership, opened a company-owned branch sales office, and appropriated CMS's investment in start-up costs. The evidence at the first trial went in smoothly until plaintiff called its chief accountant, Mr. George Springman, a certified public accountant who regularly does CMS's tax and audit work. Mr. Springman presented a calculation of cost over revenue, reflecting an investment by CMS of $260,900 over the entire period of the dealership (Exhibit 65A, Tr. I 361-2, 506) of which $73,050 was made after January 6, 1977, the date of the fraudulent representation (Exhibit 66A, Tr. 481, 747). The computed costs contained allocations based on calculated estimated apportionments of some overall CMS overhead costs (such as rent, telephone and management salary costs) to the operation of its computer division, St. Louis Information Systems ("SIS").[1] These allocations appeared to offend the District Court. The portions of the transcript at the first trial (Tr. I 360-372) and the second trial (Tr. II 759-769) included in the Appendix are but examples.

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[1] As the Court of Appeals observed, these allocations were properly for the jury. (Pet. App. 12a, 688 F.2d 1214)

(Appendix A4-A22)[2] Other examples are contained at Tr. I, 389-407, 412-420, 443-446, 526-534.[3] On May 9, 1979, the jury returned a verdict of $261,000 for breach of contract on Count III, $73,000 in actual damages on Count V for fraud committed January 6, 1977, and $750,000 in punitive damages on Count V. The damages for breach of contract and the actual damages for fraud were almost exactly the amount of Mr. Springman's calculations.

3. Sixteen months later, on September 23, 1980, the District Court ordered a new trial on both counts on the following grounds: (1) The verdicts on Counts III and V overlapped by $73,000; (2) The punitive damages award of $750,000 exceeded the amount of the prayer for relief; (3) There was "some doubt" as to whether the record provided a sufficient basis for any punitive damages, and therefore the $750,000 punitive damages award was disproportionate (C.R. 144-146, Appendix A1-A3)[4]

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[2] Tr. I ..." indicates a page reference to the transcript at the first trial, "Tr. II ..." a page reference to the transcript at the second trial, and "C.R. ..." a page reference to the Clerk's Record. "Pet ..." indicates a page reference to Basic Four's Petition For Writ of Certiorari, "Pet. App ...", a page reference to the Appendix to Basic Four's Petition and "Appendix ...", a page reference to the Appendix to this Respondent's Brief in Opposition to B/4's Petition.

[3] A witness, especially one with Mr. Springman's credentials, is entitled to be listened to instead of constantly interrupted and criticized without reason as he was here. The District Court's comments are reminiscent of other occasions on which the Eighth Circuit has criticized his coments as "better left unsaid." *Adams Dairy Company* v. *St. Louis Dairy Company,* 260 F.2d 46, 56 (8th Cir. 1958) and as having along with needless objections of counsel "abused . . . the orderly progress of the trial." *Hoppe* v. *Midwest Conveyer Company, Inc.,* 485 F.2d 1196, 1202 (8th Cir. 1973).

[4] Additionally, the District Court observed that his conclusions were "illustrated" by the fact that the jury returned a verdict in twenty minutes Appendix A-3. This is error. The fact that a jury's deliberation is brief has no effect on the validity of the verdict. See 91 ALR2d 1220-1232, and see in particular *Segars* v. *Atlantic Coast Line Railroad Company,* 286 F.2d 767 (4th Cir. 1961).

The first new trial order is significant here for serveral reasons: (1) It required the burden and expense of a second trial for reasons at least some of which are tenuous;[5] (2) It delayed the final disposition of the case sixteen months; (3) Although the evidence at the first trial was the same as at the second, there is no mention in the first new trial order of software losses or any allusion to the ground on which the remittitur or new trial was ordered after the second trial; (4) There is no mention of Mr. Springman or his testimony.

4. CMS's counsel attempted at the second trial to remove each of the District Court's objections to the first judgment expressed in the new trial order of September 23, 1980: (1) CMS requested and the District Court gave in different form an instruction at the second trial directing that in the event the jury found for plaintiff on both counts, it was to deduct from the verdict on Count III any amount awarded as actual damages for fraud on Count V. This eliminated any issue of duplication of damages; (2) CMS raised its prayer to $2,000,000. This eliminated any issue of a punitive damages award which would

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[5] The Court of Appeals was unwilling to say that the first new trial order was an abuse of discretion. It held that while the District Court might well have entered a judgment in the sum of the verdicts on the two counts less $73,000 as suggested by CMS, it was not an abuse of the discretion vested in the District Court to order a new trial based on the overlap when there was some possibility of jury confusion on punitive damages. (Pet. App. 11a, 688 F.2d 1213). The Court of Appeals held the second ground for a new trial erroneous. (Pet. App. 11a, 688 F.2d 1213) The Court of Appeals did not rule on plaintiff's contention that the third ground erroneously equated this case to an earlier doubtful case for punitive damages. (Pet. App. 11a, 688 F.2d 1213) With respect to the third ground, it is just plain difficult to understand the District Court's view that this case presented a doubtful case of punitive damages when the jury could reasonably have found and did find that a large business deliberately defrauded a small dealer into spending the necessary money to introduce the Company's product into the marketplace and then terminated the dealer when the large start-up costs had been spent and profits were near.

exceed the prayer; (3) CMS's counsel asked the jury for punitive damages five to eight times the actual damages of $78,000 for fraud shown at the second trial. This was in effect an invitation to the jury to bring in a verdict for five times the actual damages or $390,000, which was exactly the punitive damages award at the second trial.

5. On April 23, 1981, after a twelve-day second trial, the jury returned a verdict of $182,000 on Count III and $78,000 in actual damages and $390,000 in punitive damages on Count V. The evidence was essentially the same as at the first trial. The District Court stated during the second trial that a "main reason" for granting a new trial after the first trial was that he never should have let Mr. Springman testify, because Mr. Springman was not listed in answer to interrogatories as an expert at the first trial (Appendix A-18, Tr. II, 762).[6] As indicated this ground was not mentioned in the first new trial order.[7] The District Court remarked at the second trial, "You listed him as an expert this time and in my opinion, it's a $64.00 question whether or not he is an expert." (Appendix A-22, Tr. II, 768-769). The jury verdicts at the second trial were again almost exactly in accord with Mr. Springman's calculations. (Exhibit 225a2, 66C2, Tr. II, 776, 813-815).

---

[6] Plaintiff's counsel believed it inappropriate and unnecessary to attempt to surround Mr. Springman with the status of an expert, especially in view of the relatively simple calculations which he presented based upon accounts and facts of which he had a long time working knowledge. Basic/Four fully explored Mr. Springman's calculations and their bases in deposition (Tr. I 558-60, 963-4). But the District Court had serious difficulty with the fact that Mr. Springman was not named as an expert at the first trial. Hence, plaintiff did name him as an expert at the second trial.

[7] Basic/Four has previously argued and presumably will argue again that it was unnecessary for the District Court to state this reason in his first new trial order. But it is at least unusual for a District Court to sustain a motion for new trial by written order and to omit a "main

6. On July 2, 1982, the District Court held CMS was correct on every issue raised in B/4's post trial motions concerning submissibility of the case, evidence and instructions (Pet. App. 33a-56a) (C.R. 198-220). But with respect to damages for software services losses on the fraud count, he held:

> "With respect to software service costs the Court finds that the jury unjustly compensated plaintiff in Count V. The credible evidence showed that from January 7, 1977, through March 31, 1979, plaintiff had sales of $170,322.00 against expenses of $210,909.00 for a loss of $40,587.00. See Exhibit 66C-2. The credible evidence showed further that in spite of a competitive software services market and a crying need to bolster sales plaintiff invested substantial time and effort in software services. *This was required neither by the Agreement nor at the request of defendant.* Accordingly, the Court finds that the jury award in Count V improperly included $40,587.00 in losses for computer software services." (Pet. App. 52a) (Emphasis supplied.)

The District Court held that since the punitive damages award was five times the actual damages, only five times the $37,413 in remaining actual damages, or $187,065 would be allowed as punitive damages (Pet. App. 56a). Accordingly, he ordered a remittitur to these amounts on Count V so as to reduce the judgment to $406,478 or in the alternative a third trial on Count V (Pet. App. 56a).

---

reason" for the new trial, especially when that "main reason" is of extremely doubtful validity. Mr. Springman was the company's regular certified public accountant. Basic/Four was fully apprised of his calculations, having deposed him twice. And he was listed in answer to interrogatories as a fact witness at the first trial (Tr. I, 536-7, 558-60, 961-64). Under these circumstances, it was certainly not error to permit him to testify, and in any event having permitted him to testify, there was no appropriate basis for awarding a new trial. *Phil Crowley Steel Corp.* v. *Macomber, Inc.*, 601 F.2d 342 (8th Cir. 1979).

The District Court based Its conclusions on two findings of fact: (1) that Central Microfilm was not required to supply software services to Basic/Four computer customers under the Dealer Agreement; (2) that B/4 did not request CMS to supply software services. These findings of fact are directly contrary to the express terms of the Dealer Agreement, to several of B/4's written demands to CMS, and to substantial testimony.

It is basic that a working computer installation requires hardware and software. B/4 sells hardware and software. Paragraph 13 of the Dealer Agreement covers the software aspects of the dealership (Exhibit 3, Appendix A23-A26, Tr. II 44-47, 1005). Paragraph 13-A of the Dealer Agreement provides:

> "13. **Software**
>
> "A. The Dealer shall be responsible for providing adequate software programming to meet the requirements of purchasers of Systems from it. Such programming services shall also meet reasonable standards established from time to time by the Seller." (Appendix A24)

Paragraph 13-I of the Dealer Agreement provides:

> "I. The Preplanned Applications or User Software are furnished to the Dealer as a convenience and aid to the Dealer and the furnishing of the Preplanned Applications or User Software shall in no way relieve the Dealer of the responsibility to provide adequate software programming services for purchasers of Systems from it, as provided in subparagraph A." (Appendix A26)

Exhibit 163 (Appendix A27-A30, Tr. II, 270-273), a summary of B/4's dealership program furnished by B/4 to CMS's General Manager for Computer Operations, Michael Frankwicz, prior to the dealership agreement, provides in pertinent part:

"**Software**

The dealer will provide by whatever means he feels necessary all required application software contracted between the dealer and the dealer's customer for the satisfactory performance of the system. Applications software can be a source of additional revenue for the dealer. (Appendix A29)

In Exhibit 8, (Appendix A31-A32, Tr. II, 64), a letter from CMS to B/4 dated November 25, 1975, B/4 demanded:

"3. Systems installation and programming manpower for the approximate eleven systems which you need to sell in the next six months is estimated at two men, if these are CBS [Basic/Four application software package] installations. Obviously, if these are to be custom installations your requirements will double. It will be necessary for you to hire one additional systems man immediately, and make plans for the second person in concert with your sales achievement. Success beyond the minimum established goal will require additional staffing, and we advocate that you begin to develop outside software vendor master agreements to provide an alternative to increased staffing." (Appendix A32)

In Exhibit 15-A (Appendix A34-A37, Tr. II, 58), a letter agreement amending the Dealer Agreement dated May 25, 1976, B/4 demanded:

"F. **Software**

As orders are booked by St. Louis Information Systems [CMS computer division], evidence must be given to Basic/Four Corporation of the ability to install successfully in a timely basis through either additional in-house staffing or contracts with outside firms." (Appendix A36)

CMS's General Manager of its computer operation, Mr. Frankwicz, testified that CMS used in-house computer programmers at the beginning and began to use independent software vendors "as activity picked up" (Tr. II, 292). Activity "picked up" when CMS began to sell computers early in 1977 at the rate of one a month (Tr. II, 71, 296). Exhibits 65-C2 and 66-C2 (Tr. II, 776, 812-815) disclose that software expenditures began in earnest not earlier than April 1 of 1977. This record discloses that plaintiff used in-house programmers to install software at the beginning, just as B/4 suggested that they be used in Exhibit 8, and began to use independent software vendors at a point where B/4 suggested they be used, i.e., when volume began to increase. The various independent software vendors utilized by plaintiff demanded time and material payments on their first jobs (Tr. II, 292-293, 435). Software vendors trained on B/4 equipment cost time and money to develop and are considered by B/4 a valuable asset (Tr. II, 985-986). After termination of CMS, the software vendors trained at CMS's expense were available to B/4 branch and were used by the B/4 branch (Tr. II, 1348-1349).[4]

7. The District Court's order of a remittitur or a third trial on Count V rests entirely upon his factual conclusion that plaintiff's "investment of substantial time and effort in supplying software services . . . .was neither required by the [Dealer]

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[4] The Court of Appeals observed that the record includes correspondence showing that B/4 initially recommended in-house programmers and later greater reliance and on independent vendors and further that the dealership agreement, the summary of the dealership program which B/4 distributed prior to reaching the agreement and the course of dealing between these parties "leave no doubt" that CMS had the duty "to obtain and provide software services which would adopt the basic systems to the particular needs of customers." Pet. App. 12a-13a, 688 F.2d 1214. The portions of Exhibits 3, 163, 8 and 15 A and the testimony which CMS has here quoted and described admit no other interpretation.

Agreement nor at the request of the defendant." Essentially the District Court found that the Dealer Agreement (Exhibit 3) and Exhibits 8, 15 A and 163 do not provide what plainly they do provide. He held that the jury could not reasonably have found that the documents say what on their faces plainly they do say. His holding is, as previously stated, the equivalent of saying that white is black.[9]

8. The portion of the order of July 2, 1981 granting a remittitur or in the alternative a third trial on Count V serves no purpose but to prevent an appeal. Under *Donovan* v. *Penn Shipping Co., Inc.*, 429 U.S. 648, 97 S.Ct. 835, 51 L.Ed.2d 112 (1977), agreement by plaintiff to the remittitur order would have barred plaintiff from appealing the erroneous reduction of the judgment. Plaintiff's alternative was a third expensive trial in order to exercise its right of appeal. The District Court found the judgment too high by a sum certain. It could have reduced

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[9] B/4 argued in the Court of Appeals that this portion of the District Court's order was a determination that CMS was grossly inefficient in handling software services. The Court of Appeals correctly held: (1) That is not what the order says. It says that software losses may not be recovered because CMS's investment in software services was not required by the Dealer Agreement or requested by the defendant, and (2) The issue of CMS's alleged inefficiency in handling software services which B/4 erroneously attempted to raise was in any event for the jury (Pet. App. 13a-14a, 688 F.2d 1214-1215). B/4 attempts at pages 8 and 9 of its Petition to sidestep this point by contending that the language of the District Court's order recites some undefined insufficiency of the evidence to support the software losses as damages. But the language of the District Court's order is clear. The District Court squarely held that $40,587 in actual damages for software losses and five times that amount of punitive damages were not recoverable because CMS's investment in software services was not required by the Dealer Agreement or requested by the defendant. As the Court of Appeals held, this conclusion is plainly wrong. No amount of argument will change the language of the District Court's order or by forced construction alter its meaning.

the judgment and thus permitted both sides to appeal. *Staplin* v. *Maritime Overseas Corp.*, 519 F.2d 969 (2nd Cir. 1975); *Garfield Aniline Works* v. *Zendle*, 43 F.2d 537, 538 (3rd Cir. 1930). Plaintiff pointed out in a motion for rehearing filed July 7, 1981 the plainly erroneous factual basis for the remittitur order, the unfair dilemma in which it placed plaintiff, and the fact that if the District Court had chosen to do so, it could have reduced the judgment permitting both sides to appeal. (C.R. 221-223 and Exhibit C to the Record on Appeal, p. 6) Reconsideration was denied (C.R. 225-226).

9. CMS has expended over $200,000 in pressing what counsel believes to be a meritorious case of malicious fraud. Two juries have so found. Try as one will, it is impossible on this record to find any kind of rational basis for saying that the Dealer Agreement (Exhibit 3) and Exhibits 8, 15 and 163 do not require and request CMS to invest money and effort in supplying software services. Try as one will, it is impossible on this record to find any kind of rational basis for the District Court to order a remittitur or in the alternative a new trial instead of a reduction of the judgment on Count V after the second trial.[10]

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[10] The usual purpose for an order directing a remittitur or in the alternative a new trial is not present here. Remittitur is usually used in cases such as personal injury damage suits where the court concludes that a verdict is excessive but there is not an acceptable sum certain shown by the evidence to which the judgment may be reduced. In such cases the court, based on its view of all the evidence, in its discretion arrives at a figure deemed to be the maximum which a jury might reasonably have allowed and orders a remittitur or in the alternative a new trial, because it cannot quantify the precise amount by which the verdict is excessive. Where, as in the instant case, the district court concludes the verdict was too high by a computed sum certain, remittitur as distinguished from reduction of the judgment by the sum certain serves no purpose. If it is argued that a third trial would permit more proof that software services were required or requested, how much more proof could plaintiff offer?

It is under these rare circumstances that the Court of Appeals, after review based on over 2500 pages of testimony at 21 days of proceedings at two trials, in its discretion decided to review the second new trial order by writ of mandamus.

REASONS FOR DENYING THE WRIT

B/4's petition for writ of certiorari should be denied, because the Court of Appeals issued the writ of mandamus under settled principles of law. Mandamus is concededly appropriate only in the rare and extraordinary circumstances outlined by the cases. The Court of Appeals applied the existing case law to find them here. There is no occasion for this Court to define further the rare and extraordinary circumstances which will warrant the discretionary issuance of the writ of mandamus.

I

The Court Of Appeals Correctly Exercised Its Discretion To Review By Mandamus The District Court's Order Of A Remittitur Or In The Alternative A Third Trial, Because The District Court's Order Is So Blatantly Wrong As To Amount To A Judicial Usurpation Of Power.

Mandamus is available for interlocutory review "under exceptional circumstances amounting to judicial usurpation of power." *Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 66 L.Ed.2d 193, 101 S.Ct. 188 (1980). The cases have recognized that it is possible for a decision of law or fact by a district court in granting a new trial to be so wrong as to amount to a judicial usurpation of power and thus warrant a court of appeals' grant review by mandamus. Rare though the cases are, the courts have recognized that a district court does not have discretion to order needless retrial on the ground that white is black.

In *Grace Lines, Inc.* v. *Motley*, 439 F.2d 1028 (2nd Cir. 1971) one juror remarked during the polling of the jury following a verdict for the defendant that she voted for the verdict in order to make the verdict unanimous. The district court, on its own motion, ordered a new trial and set the retrial three days later. The remarks of the juror were brief and plain. The law was clear that they did not amount to a sufficient basis for a retrial. The

Second Circuit by mandamus ordered the new trial order set aside and judgment entered on the verdict for the defendant. One judge observed that "mandamus will lie in the sound discretion of the Appellate Court where the trial court has committed a clear abuse of discretion" and held that the district court abused its discretion in ordering a new trial. Another judge observed that mandamus was required to "correct an egregious error of the District Court in setting aside the verdict of the jury and in scheduling a needless retrial." The *Motley* case turns ultimately on the fact that the juror's remarks were brief and plain and the law completely clear that they did not amount to a sufficient basis for a retrial.

In *General Motors Corporation* v. *Lord,* 488 F.2d 1096 (8th Cir. 1973), the Eighth Circuit distinguished *Motley* on the ground that the district court's ruling on an evidentiary issue in sustaining a motion for new trial was not so "blatantly wrong" as to justify the issuance of mandamus.

In *In re United States,* 565 F.2d 173, (1st Cir. 1977) the First Circuit set aside a new trial order by mandamus in a criminal case and ordered the judgment of conviction reinstated. The Court balanced the various considerations appropriate to a decision to grant or deny a writ of mandamus and relied heavily on the conclusion that the district court ignored completely the rules contained in the Federal Rules of Criminal Procedure which govern the granting or denying of a motion for new trial on the ground of newly discovered evidence.

These cases recognize the necessary corollary to the rule that mandamus will issue only under exceptional circumstances amounting to judicial usurpation of power. The exercise of reasoned factual judgment and reasoned selection and application of controlling principles of law is basic to the judicial process. While it is true, as Basic/Four suggests, that mandamus does not "run the gauntlet of reversible errors" (Pet. 7), it is also true that there is a point beyond which a needless retrial

may not be based on a *non sequitur*. When a decision is so "blatantly wrong" as to be the equivalent of saying that white is black or a spade is a club, judicial power has been usurped and even the broad discretion vested in the district court on a motion for new trial is exceeded.

This is such a case. The Court of Appeals correctly held review by mandamus is available here because the right to the writ is "clear and indisputable" and the District Court's decision was "blatantly wrong" (Pet. App. 7a, 688 F.2d 1212). As the Court of Appeals quite correctly decided, the District Court's second new trial order was based entirely on his conclusion that software services were "required neither by the [Dealer] Agreement nor at the request of the defendant." There is no rational basis of any kind for saying that the two pages of Paragraph 13 of the Dealer Agreement, particularly Paragraphs 13A and I, do not require CMS to provide software services. There is no rational basis of any kind for saying that Exhibits 163, 8 and 15A do not request that CMS provide software services to its customers by whatever means it deems appropriate. The documents are brief and plain, and their meaning clear. A district judge simply does not have jurisdiction to hold that a jury may not reasonably find that a document says what it says. He may not be this blatantly wrong in ordering a needless retrial. Hence, review by mandamus was appropriate.

II

The Court Of Appeals Correctly Exercised Its Discretion To Grant Review By Mandamus Of The District Court's Order For A Remittitur Or In The Alternative A Third Trial, Because It Appears That The Parties And The District Court Were Embarked Upon A Course Which Would Otherwise Lead To Successive Needless Retrials.

The Eighth Circuit based review herein by mandamus in part upon the following:

> Twice the plaintiff has prevailed on its contract and fraud claims, obtaining substantial awards of actual and punitive damages. The only outstanding issues are CMS's contention that it software losses were properly recoverable and Basic/Four's claims that it was entitled to j.n.o.v. as a matter of law, that the punitive damage award was excessive and that the jury was given erroneous instructions. Each of these issues has been squarely decided by the district court or the jury. Appellate review is thus "fundamental to further conduct of the case."[11] Absent review, a third trial would present the type of needless relitigation which is antithetical to the final judgment rule. Moreover, in a light of the district court's post-trial rulings, a third trial would be conducted with virtually the same instructions and evidence as at the second trial, so if the parties' assertions of error are valid, a fourth trial could well be necessary. (Pet. App. 9a-10a, 688 F.2d 1213)

Thus the Court of Appeals correctly observed that the parties and the District Court appeared to be embarked upon a course which would relitigate unnecessarily one or more times precisely the positions litigated at the first two trials with the same results.

B/4 argues at pages 9 and 10 of its Petition that it is irrelevant that the District Court's order followed a second trial, citing a number of cases involving two or more trials where mandamus was denied. But B/4 cites no case in which a plaintiff has twice

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[11] The phrase "fundamental to the further conduct of the case" is taken directly from this Court's opinion in *Gillespie* v. *United States Steel Corporation* 379 U.S. 148, 152-154, 85 S.Ct. 308, 13 L.Ed.2d 199 (1964) in which a marginally final order is held reviewable on direct appeal where "fundamental to the further conduct of the case" i.e. where appeal is appropriate to permit the case to get on to a conclusion. Compare *Haberern* v. *Lehigh & N. E. Ry. Co.*, 554 F.2d. 581 (3rd Cir. 1977) where a stay order which had the practical effect of suspending plaintiff's claims indefinitely was held final and appealable.

won large jury verdicts and faces a third trial because of a blatantly erroneous finding of fact that a judgment is to high by a sum certain coupled with a remittitur or new trial order that serves no purpose but to prevent finality and appealability. The fact that there is the prospect of a third trial in the instant case is an important aspect of the extraordinary circumstances which warrant mandamus here, because it presents directly the prospect of repeated needless retrials.

It is impossible to review the record of these two trials and not conclude that there is a real risk that if plaintiff CMS should be required to try its case on Count V again and receive another large verdict, there would be an order for still another needless retrial.

Whatever may be the merit of the first new trial order, it is clear that the second is completely baseless. It rests upon findings of fact which are so wrong as to defy reasoned analysis. And considerations of judicial economy and conservation of the parties' resources would seem to compel ordering a reduction of the judgment rather than a remittitur or in the alternative a third trial. Such an order would permit the Court of Appeals to affirm the reduction if correct and reverse it if wrong. The only function served by the remittitur feature of the District Court's order of July 2, 1981 is to require CMS either to agree to a patently erroneous reduction of its second judgment and thus forego the right to appeal the reduction, or to bear the burden and expense of a needless third trial as the price of a final appealable order. The fact that the District Court has entered so baseless an order after two substantial plaintiff's verdicts is reason to apprehend that a large plaintiffs verdict on Count V after a third trial would produce still another equally baseless new trial order.

Moreover, the District Court stated at the second trial that Mr. Springman's testimony was a main reason for the first new trial order although that point is not mentioned in the order

itself. The reason given for the second new trial order, the claimed failure of the Dealer Agreement to require or the defendant to request that CMS supply software services, was not mentioned in the first new trial order. CMS could not anticipate or guard against any risk that the District Court would make such a ruling after the second trial. Although Mr. Springman's damages calculations, including allocations of overhead, involve only the most elementary principles of cost consideration and two juries have now accepted them almost to the dollar, the District Court's unexplainable antagonism toward plaintiff's attempt to recover its allocated overhead expenses cannot be ignored. The District Court's attitude and willingness to grant a new trial for a main reason not contained in his first new trial order, together with his willingness to enter a baseless new trial order after the second trial, gives rise to the inference that if plaintiff should be required to try and win its case again, there would be still another new trial order, especially if another jury should accept Mr. Springman's calculations.

B/4 places it principal reliance on *Allied Chemical Corporation* v. *Daiflon, Inc.*, 449 U.S. 33, 66 L.Ed.2d 193, 101 S.Ct. 188 (1980). In *Daiflon,* the district court set aside a large plaintiff's verdict in an antitrust case and granted a new trial. The Tenth Circuit granted review by mandamus, directing that a portion of the district court order granting a new trial be set aside. It based its conclusion on the arbitrary and erroneous nature of the district court's conduct and decision (612 F.2d 1249). This Court reversed in a *per curiam* opinion in which five members of the Court concurred, characterizing the availability of mandamus by reference to the refrain, "What never? Well, *hardly* ever." (449 U.S. 36). Two members of the Court did not participate. Two voted to pursue the matter further.

But *Daiflon* involved one new trial order, not two. Suppose the *Daiflon* case were retried and plaintiff again prevailed. And suppose the district court awarded defendant a third trial on

plainly erroneous grounds or wrote a remittitur order directing on plainly erroneous grounds that plaintiff remit a large sum certain out of a second plaintiff's verdict or submit to a third trial. At some point the kind of circumstances involved in *Daiflon* and involved in the instant case must warrant the intervention of the Court of Appeals by mandamus, especially when the second new trial order turns on a conclusion as erroneous as the one here and serves no purpose but to prevent an appeal.

The "All Writs" statute provides that the courts of appeal have jurisdiction to issue all "writs necessary . . . . .in aid of their respective jurisdictions. . .," 28 U.S.C. 1651. This Court has stated in *Roche* v. *Evaporated Milk Association,* 319 U.S. 21, 63 S.Ct. 938, 87 L.Ed. 1185 (1943) that this authority

> ". . . is not confined to the issuance of writs in aid of a jurisdiction already acquired by appeal but extends to those cases which are within its appellate jurisdiction although no appeal has been perfected. Otherwise the appellate jurisdiction could be defeated and the purpose of the statute authorizing the writ thwarted by unauthorized action of the district court obstructing the appeal." (319 U.S. 25)

The two trials herein have consumed 21 days of trial proceedings and over 2500 pages of trial transcript. Defendant has discovered and rediscovered every conceivable aspect of the case. Thus, for example, the defendant took the deposition of Michael Frankwicz, CMS's general manager, for over ten full days. And there have been other lengthy depositions of plaintiff's personnel and other personnel. This is not a big enough case to stand the kind of cost burden which successive retrials are imposing. There is a real risk that the burden of successive retrials will deprive CMS of its right to conclude this case in the District Court and to present its position in the Court of Appeals. Hence review by mandamus was appropriate.

III

The Court Of Appeals Correctly Exercised Its Discretion To Review By Mandamus The District Court's Order Of A Remittitur Of A Sum Certain Or A Third Trial, Because The Order Presents An Important Question On Which Guidance Of The District Courts Is Appropriate.

Extraordinary circumstances where the order under attack is characteristic of a practice likely to reoccur or exemplifies a novel and important question in need of resolution for future cases will warrant review by mandamus. *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249, 258, 77 S.Ct. 309, 1 L.Ed.2d 290 (1957); *Schlagenhauf* v. *Holder*, 379 U.S. 104, 111-112, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964); *General Motors Corporation* v. *Lord*, 488 F.2d 1096, 1099 (8th Cir. 1973).

As shown in the previous section there is a likelihood of recurrence in this case.

Rule 61, Federal Rules of Civil Procedure, bespeaks a policy against needless retrials. Such a policy is just as important as the final order rule to the conservation of the resources and energies of bench, bar and litigants. The policy considerations which underlie the final order rule and the policy considerations against needless retrial should be balanced one against the other. Opportunities for pronouncing guidelines for district judges in this important context are rare. They are normally confined to such cases as *Fireman's Fund Insurance Co.* v. *Aalco Wrecking Co., Inc.* 466 F.2d 179 (8th Cir. 1972) and *Reed Brothers, Inc.* v. *Monsanto Company*, 525 F.2d 486 (8th Cir. 1975) in which an order granting a motion for new trial is coupled with an ~~order denying a motion for new trial is coupled with an~~ order denying a motion for judgment n.o.v. and reviewable as such under Rule 50(c)(1), or to situations where the Court of Appeals must speak, as it did in *General Motors Corporation* v. *Lord*, 488 F.2d 1096 (8th Cir. 1973) by way of dicta accompanying

denial of review by mandamus. As the necessarily few opinions on the subject indicate, district judges do grant new trials for reasons which do not warrant them.

The Court of Appeals based its discretionary assertion of jurisdiction by way of mandamus here in part on the following:

> "An important issue is also presented on which guidance for future cases is appropriate: whether generally a new trial rather than a reduced judgment should be ordered when the only alleged defect involves a discrete question of law and fact relating to a sum certain in damages." (Pet. App. 10a, 688 F.2d 1213)

The Court went on to present the guidelines by pointing out that when the only defect in a judgment is that it is too high by a sum certain, reduction of the judgment rather than a new trial is appropriate. (Pet. App. 15a, 688 F.2d 1215)

The case falls squarely within the principles announced in *LaBuy* and *Schlagenhauf* which authorize the courts of appeal in their discretion to assert supervisory jurisdiction by way of mandamus over the district courts review an error likely to reoccur or to provide guidance to the district courts for the resolution of novel and important questions. (See 9 Moore's Federal Practice ¶110.26, p. 287, ¶110.28 p. 312)

This is an especially suitable case for the exercise of supervisory appellate jurisdiction by way of mandamus. The extraordinary circumstances of the case include two successive large plaintiffs verdicts, a conclusion by the District Court that judgment should be reduced which is predicated on a blatantly wrong finding of fact, and a remittitur requiring that judgment be reduced by a sum certain or in the alternative ordering needless third trial. The circumstances are so extreme that there is no risk the grant of mandamus here will erode the final order rule.

CONCLUSION

In *Allied Chemical Corp.* v. *Daiflon Inc.*, 449 U.S. 33, 66 L.Ed.2d 193, 101 S.Ct. 188 (1980). This Court characterized the availability of mandamus with the refrain "What, never? Well *hardly* ever." (449 U.S. 36). The phrase "*hardly* ever" necessarily means that there may be rare occasions on which the writ is available to review a district court's new trial order if the required extraordinary circumstances are found to exist.

The Court of Appeals correctly found three separate bases for the exercise of its discretion to grant the writ of mandamus here. Each is soundly based on cases already decided. There is no more to be said about the extraordinary circumstances which will warrant review by mandamus than has already been said in the decided cases. When the exceptional case which warrants mandamus is presented, it is clearly recognizable. This is such a case.

The efficient administration of justice and the proper balance between the final order rule and the policy against needless retrials will be best served if the opinion of the Court of Appeals is permitted to stand as the rare example of the extraordinary circumstances which warrant review by mandamus of a new trial order.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Attorney for Respondent

Appendix:

Appendix A - Memorandum and Order, of the United States District Court, Eastern District of Missouri, Eastern Division A-1

Appendix B - Excerpts of Testimony of Plaintiff's Certified Public Accountant, George Springman, at the First Trial A-4

Appendix C - Excerpts of Testimony of Plaintiff's Certified Public Accountant, George Springman, at the Second Trial A-14

Appendix D - Excerpt from the Dealer Agreement . A-23

Appendix E - Plaintiff's Exhibit 163 — The Basic/Four Corporation Dealership Program A-27

Appendix F - Plaintiff's Exhibit 8 ..... A-31

Appendix G - Plaintiff's Exhibit 15A A-34

APPENDIX A

The First New Trial Order Of September 23, 1980

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 78-550C (A)

Central Microfilm Service Corporation,
a Missouri corporation,
Plaintiff,

vs.

Basic/Four Corporation, a Delaware corporation,
Defendant.

MEMORANDUM AND ORDER

This matter is before the Court on defendant's motion for a judgment notwithstanding the verdict or in the alternative for a new trial.

The motion contains twenty-five grounds and the briefs on behalf of both parties are very lengthy. There is no occasion for the Court to deal with each of the grounds set forth in the motion. The jury verdict for the plaintiff was for the sum of $261,000.00 on Count III, $73,000.00 in actual damages on Count V, and $750,000.00 in punitive damages on Count V, the only two counts submitted to the jury.

The damage instructions on Counts III and V overlap as to damages that are recoverable (other than punitive), in that the actual damages covered by the instruction on Count III (Instruction No. 7) are in part also covered in the damage instruc-

tion on Count V (Instruction No. 8). In other words, the $73,000.00 verdict returned by the jury as actual damages under Count V is also a part of the $261,000.00 verdict returned by the jury as damages under Count III.

This is a suit governed by the Missouri law, and the Missouri courts have held that plaintiff cannot recover twice for the same claim. *Borserine* v. *Maryland Casualty Co.*, 112 F. 2d 409, 416; *Ingram* v. *Great Lakes Pipe Line Co.*, 153 S. W. 2d 547. The Eighth Circuit Court of Appeals in *Greenwood Ranches, Inc.* v. *Skie Construction Co., Inc., et al.*, in an opinion filed on August 11, 1980, at the bottom of page 6 and top of page 7 of the opinion deals with a similar problem, and in part the Court said, page 7:

> "In this situation, a plaintiff is not entitled to a separate compensatory damage award under each legal theory. On the contrary, he is entitled only to one compensatory damage award if liability is found on any or all of the theories involved. (Citing cases.)"

The instructions referred to above as given are clearly erroneous as they permit assessment of double damages, and double damages were assessed by the jury. The double recovery by the plaintiff alone is basis for a new trial. Turning further, however, to the jury verdict of $750,000.00 in punitive damages, the prayer of the complaint asked for only $500,000.00 in punitive damages, some $250,000.00 less than the jury awarded.

The attorney for the plaintiff in arguing damages to the jury had this to say with respect to Count V:

> "Here are the expenses for January 7, 1977, computed in the same fashion, and here with the cutoff period 12,000 in fiscal '77; 42,000 fiscal '78; and 17,000 in fiscal '79. These would be the best computations we could make for the fraud actual damages. * * * And in addition, we ask for

punitive damages because what they did id the fraud was willful, wanton and malicious, and we suggest to you when you come to assess punitive damages you consider how much money it would take to deter Basic/Four and others like them from ever doing this to another distributor. I suggest something in the neighborhood of two or three times, or three or four times our damages on fraud."

In *Northern* v. *McGraw-Edison Co.*, 543 F. 2d 1336, 349-50, the Eighth Circuit Court of Appeals said:

> "Under Missouri law, '[t]he question of whether or not punitive damages shall be awarded, and, if so, in what amount rests peculiarly in the discretion of the jury.' *Wisner* v. *S. S. Kresge Co.*, 465 S. W. 2d 666, 669. * * * However, the amount of damages, which also rests in the discretion of the jury, 'must have some reasonable relation to the injury inflicted.' *Wisner* v. *S. S. Kresge Co., supra* at 669. (Citing other cases.)"

While there is some doubt as to whether under the present record there is sufficient basis for punitive damages, even if proper, the $750,000.00 given by the jury in the punitive damages award, as set out above, is beyond the amount of the prayer, disproportionate to the injuries suffered, if any, and an abuse of discretion on the part of the jury. This is further illustrated by the fact that while it took nine days to try the case, the jury returned a verdict in twenty minutes after it was submitted to it by the Court.

Accordingly, the Court sets aside the verdict and judgment entered in favor of the plaintiff, and defendant's motion in the alternative for a new trial is sustained, and a new trial is ordered.

/s/ Illegible
U. S. District Judge

APPENDIX B

Excerpt Of Testimony Of Plaintiff's Certified Public Accountant, George Springman, At The First Trial

[360] AFTERNOON SESSION, WEDNESDAY, MAY 2, 1979

Pursuant to adjournment as aforesaid, at 1:45 o'clock P.M. of said Wednesday, May 2, 1979, the court met, present and presiding as before, and the trial proceeded as follows:

THE COURT: Call your next witness.

MR. RUTHERFORD: Mr. Springman.

GEORGE L. SPRINGMAN,

being produced, sworn and examined in behalf of the plaintiff, testified as follows:

Direct Examination

By Mr. Rutherford:

Q. What is your name, please, sir?

A. My name is George L. Springman.

Q. Where do you live, Mr. Springman?

A. 1931 Muir Woods Lane, St. Louis, 63131.

Q. What is your profession or occupation?

A. Certified public accountant.

Q. Are you with a firm?

A. I am, sir.

Q. What is the name of your firm?

A. Curry, Lenhardt and Company.

Q. How long have you been a certified public accountant?

A. Since 1970.

[361] Q. Do you have any connection with St. Louis Business Products Center in your accounting work?

A. Yes, sir.

Q. What is that connection?

A. My firm has been doing the accounting and audit work for the Business Products Center companies for more than 20 years.

Q. Do you have some relationship in your — strike that.

Do you personally have some relationship with those companies in your accounting work?

A. Yes, sir.

Q. What is that?

A. I have personally been responsible for supervising management of the accounting and auditing work for many years.

Q. For all the companies?

A. For all of the companies, yes, sir.

Q. Does that include Central Microfilm Company?

A. Yes, sir.

MR. RUTHERFORD: Would you mark this, please?

(A document, handed to the reporter, was marked for identification as Plaintiff's Exhibit 65A.)

MR. BARON: Was this on the list of exhibits or [362] not? This is the one today?

MR. RUTHERFORD: This is the one that I gave you today, that's right.

THE COURT: Let me see what it is. Off the record.

(Whereupon, a short discussion was had off the record.)

Q. (By Mr. Rutherford) Were you requested to prepare a comparative statement of income and expense for St. Louis Information Systems Division of Central Microfilm?

A. Yes, I was.

Q. Have you prepared several such statements?

A. Yes, sir.

Q. I hand you what's been marked as Exhibit 65A. When was that statement prepared?

A. This statement was prepared April 20, 1979.

Q. Well now, is that what you have before you not a revision of the April 20 statement?

A. This is a revision of the April 20 statement.

Q. When was the revision prepared?

A. Last night.

Q. I direct your attention to page 1 of 65A to the two items at the bottom of page 1, and these adjustments are as a result of the stipulation of counsel, and I'm [363] simply going to lead you through these, if there is no objection.

Is it the case that the two adjustments at the bottom of page 1, "Reduction in cost of sales" in the amount of $2,710, the "Increase in income," both of which are indicated as resulting from the stipulation of counsel, the latter being $24,139, is it the case that those were made on my instructions?

A. Yes, sir.

Q. Is it also the case that — strike that.

Now, did you also last night make certain revisions in the 1979 figures for expenses.*

A. Yes, sir.

Q. And for income?

A. Yes, sir.

Q. Any changes to the figures for the years 1976, '77 and '78 as between the April 20 statement and this revised statement?

A. No, sir.

Q. What changes were made in the expense and income figures for the year 1979 as between the April 20 statement and this one?

MR. BARON: Your Honor, I wish to interpose an objection at this point. I'm going to object to any **[364]** testimony from this statement from this person until a foundation is laid for it.

There are no numbers that can be testified to until we know how the numbers were prepared, until the scope of what the employment was on this thing becomes obvious. It's been testified he's a certified public accountant. It's not clear in what capacity this was prepared, your Honor.

I think that the statement is hearsay. I think it's not an accountant's opinion. I don't think it's — if I hear their basis, I have a series of other objections which I'd like to interpose at that time, after we hear the basis that we might have for putting this in. I'd reserve the right to make that. At this time I'd like to object on the basis of I would want to know how this is coming in.

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* It is undisputed that these revisions were to shorten the cut off time for calculations pertaining to certain items in Fiscal 1979 and resulted in a small reduction of the losses claimed.

MR. RUTHERFORD: It's my intention at this point simply to show the nature of the revisions and why, as to demonstrate the relationship between this statement and the one furnished to counsel on April 20, and I will be happy to take them seriatim as I go through.

MR. BARON: My point is —

THE COURT: You're going to have to lay a foundation for it. There isn't any question about that.

[365] MR. RUTHERFORD: All right.

Q. (By Mr. Rutherford) I direct your attention to page 2 of 65A.

MR. BARON: I make the same objection.

THE COURT: Same ruling. You're going to have to lay your foundation before you get into that. There isn't any need in trying to get into the details of it until you lay a foundation, what it is, where it came from, what it's all about, whether he's in here properly.

Q. All right. Would you please describe generally how this statement was prepared?

A. In general terms, the statement was prepared by —

THE COURT: Don't get into general terms. You're going to have to get into specifics.

THE WITNESS: The statement was prepared by taking the accounts attributable to the St. Louis Information Systems* —

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* St. Louis Information Systems or, S.I.S., was the unincorporated division of Central Microfilm Service Corporation which conducted Central Microfilm's Basic/Four dealership.

THE COURT: You're going to have to get more specific than that. You're going to have to tell us where they came from, what this is. In other words, this jury is entitled to know, they're going to have to know where you got this information, what it's from, and you're going to have to have those records here to support it.

Now, you're going to have to lay your foundation. **[366]** If you don't, you're wasting your time on this. If you haven't got that stuff in here, you're probably in trouble here.

MR. RUTHERFORD: It's here. It's all here.

Q. (By Mr. Rutherford) Will you please describe generally how the statement was prepared and from what source?

THE COURT: Not generally, specifically. There's no general to it. You're not getting into it in general. You're going to have to get into the details on this thing because this is an exhibit that was prepared from something else.

MR. RUTHERFORD: I will, your Honor.

THE COURT: You're going to have to get specific with it. They're objecting to it, so there's no need in wasting their time on the other. Just lay your foundation.

MR. RUTHERFORD: If your Honor please, I plan to simply take advertising expense —

THE COURT: I don't care what you plan to do. You're going to have to let him tell you where it comes from. If they want to see it, they've got a right to see it. In other words, he's got a summary here, and it's based upon something else. The jury is entitled to know where it came from. They're entitled to see it and cross-examine on it **[367]** if they want to. If it isn't in the books, what is it, who's responsible for putting it there, how it came about. He may not even know that, I don't know, but that's your problem.

I don't know what he knows about them. The jury doesn't know, either. In other words, you're going to have to get your foundation before you start dealing with the figures in here.

MR. RUTHERFORD: If the court please, let me try it this way; what specific records is Exhibit 65A based on?

MR. BARON: Excuse me, your Honor, I'd like to know who did what to these records, if he prepared it. We don't even know that.

THE COURT: I think we're going to have to show that.

MR. RUTHERFORD: Let me try it a different way.

Q. (By Mr. Rutherford) There's an advertising item on the expense statement —

MR. BARON: Excuse me, I object to any testimony —

THE COURT: Sustained. You're going to have to lay your foundation as to who prepared it, what it's prepared from, where it come from. This is nothing but a summary.

Q. (By Mr. Rutherford) Who prepared the statement, [368] Mr. Springman?

A. The statement was prepared under my supervision by two other staff members from our firm.

Q. What function did you have in the preparation of the statement?

A. My function was supervisory. I did assist in some of the field work.

Q. What records were used?

A. The records that were used were the general journal.

Q. Of what company?

A. I'm sorry, the general ledger of Central Microfilm Service Corporation and the various journals, the cash receipts journal, the cash disbursement journal, sales journal, and payroll journal, all of Central Microfilm Service Company.

MR. RUTHERFORD: May I approach the bench?

(Colloquy between counsel and the court in the presence of but out of the hearing of the jury.)

THE COURT: Take the jury out.

(Whereupon, the following proceedings were had out of the presence and hearing of the jury.)

THE COURT: What is it you all are wanting to do? You can speak out. The jury is out of the room. Let's see [369] if we can get squared away.

MR. RUTHERFORD: We'll take you through what this is, what we propose to prove. The statement shows expenses and income. The second page consists of a number of expense items. There are accounts which cover most, if not all, most of these items, they are coded within the Central Microfilm.

THE COURT: We don't need you to make a statement. This is the man you wanted, you brought him here, you're going to have to get into it with him. What I want to know before you get into this is what you're talking about, where it comes from. These people don't have to take his word for it. They're entitled to see the basis on which it came from.

MR. RUTHERFORD: Judge, they have had these records —

THE COURT: I don't care anything about that. That hasn't got anything to do with it. You're in the trial now. The fact they may have looked at something doesn't mean anything. The fact that you show them something doesn't mean it's proper testimony on the part of either side of you.

MR. RUTHERFORD: All right.

THE COURT: Let me ask you a question; you made [370] this from books and records?

THE WITNESS: Yes, sir.

THE COURT: Have you got the books and records that you can point those figures out on?

THE WITNESS: Yes, sir.

THE COURT: All of them?

THE WITNESS: Yes, sir.

THE COURT: No estimates?

THE WITNESS: There are allocations.

THE COURT: Allocations in the books?

THE WITNESS: No, sir.

THE COURT: That's the problem you're getting into. In other words, they're not going to take this at face value. In other words, you've got the books and records of the parent company?

THE WITNESS: Yes, sir.

THE COURT: Do they have a separate outfit for S.I.S.?

THE WITNESS: No, sir.

THE COURT: And you don't want the jury to know, they're not entitled to know it before he gives them a lot of figures?

MR. RUTHERFORD: Judge, I was going to have him give the figures. I was going to explain how it was done [371] first before talking about any figures, and the only way —

THE COURT: I haven't heard you say anything about it except you want to point out a figure. I asked you to qualify him as to where this come from, what it is, whether or not it's based

upon facts, or whether or not it's based upon suggestions, allocations, and stuff of that kind; in other words, whether or not it is book entries or whether or not it's made from what somebody told him to make.

MR. RUTHERFORD: There are some book entries, most of the entries are book entries.

THE COURT: S.I.S.?

MR. RUTHERFORD: Yes.

THE COURT: He said not.

THE WITNESS: There isn't a separate general ledger —

THE COURT: What have you —

THE WITNESS: — within the Central Microfilm general ledger, there are accounts specifically designated.

THE COURT: I asked if you had anything about it and you said no.

THE WITNESS: Well, it's not — I understood, I thought you were referring to a separate general ledger.

THE COURT: I asked you if in those books there [372] were items that are carried throughout the thing as S.I.S.?

THE WITNESS: Well, that there are, yes, sir.

THE COURT: What categories?

THE WITNESS: Revenue and expenses and a few assets.

THE COURT: What's the allocations?

THE WITNESS: There are the allocations which have been made on general and administrative overhead items.

THE COURT: The other specific items are in there coded S.I.S.?

THE WITNESS: Yes, sir.

* * * * * * *

APPENDIX C

Excerpt Of Testimony Of Plaintiff's Certified Public Accountant, George Springman, At The Second Trial

[745] GEORGE L. SPRINGMAN,

Of Lawful Age, Having Been First Duly Sworn To Testify The Truth, The Whole Truth, And Nothing But The Truth In The Case Aforesaid, Testifies And Says In Reply To Oral Interrogatories Propounded As Follows, To-Wit:

Direct Examination

Questions By Mr. Rutherford:

Q. What is your name?

[746] A. My name is George L. Springman.

Q. Where do you live, Mr. Springman?

A. I live at 1931 Muir Woods Lane, Town and Country, Missouri.

Q. What is your profession or occupation?

A. I'm a Certified Public Accountant.

Q. With what firm are you?

A. With the firm of Curry Lenhardt and Company.

Q. How long have you been a certified public accountant?

A. Since 1970.

Q. How long have you been with Curry Lenhardt?

A. Since 1966.

Q. Have you had occasion to work on the St. Louis Business Product Companies' accounting work?

A. Yes, sir.

Q. For how long?

A. Since 1966.

* * * * * * *

[758] [By Mr. Walpin]

Q. And what — am I correct what you are prepared to testify to is a report based upon allocating expenses and revenues in evaluating the computer dealership?

A. I'm expecting to testify on the direct expenses of the St. Louis Information Systems and the allocation of the indirect expenses which we made the indirect expenses of [759] Central Microfilm.

Q. And am I correct that that allocation was not done as part of your normal audit work for Central Microfilm?

A. It was not. That's true.

MR. WALPIN: I renew my objection, your honor.

THE COURT: Take the jury out.

(Following proceedings were had out of the presence of the jury):

THE COURT: What are you purporting to show?

MR. RUTHERFORD: I am purporting to show, if your honor please, Defendant's Exhibit 65B.

THE COURT: I want to know what you're purporting to show.

MR. RUTHERFORD: That he was taken from the books and records, traced back to the original invoices the expenses and the revenues, and that he has made a calculation of direct expenses and revenues, and that he has made allaocations of overhead expenses not allocated on the books, but —

THE COURT: Be kind enough to tell me now — we've been through some of this once before. Part of it is nothing in the world but general accounting on expenses and income.

MR. RUTHERFORD: That's all it is, judge.

THE COURT: No, it isn't all it was before, and it [760] isn't all he indicated here. He didn't say that that's what these exhibits were.

Are these — these are not the exhibits you had here before in this other case, is it?

THE WITNESS: 65A and 65B are, yes, sir — 65A and 66A. 66B and 66A are revised.

THE COURT: And how are they revised? In what respect?

A. We have — the exhibits were subject to scrutiny by Touche Ross. Touche Ross sat in on my deposition. I sat on the deposition of the Touche Ross expert, and we agreed upon errors, certain errors and changes within the statements. Some of the changes —

THE COURT: Now, don't start in on that. Now, you remember when you were here before in the trial of this case and you remember some of the problems we had, and part of those was a result of stuff that was not shown in the books?

THE WITNESS: Yes, sir.

THE COURT: Is part of that in these things?

THE WITNESS: Yes, sir.

THE COURT: Well, that's the part that I'm talking about. Now, if they are anything like they were before, part of them are based solely and primarily on the books, and I assume with that you have no quarrel.

MR. WALPIN: No quarrel, your honor.

[761] THE COURT: But when you get to the allocation of the other part, we had trouble with that before and you're going to have trouble again, and I'm telling you now unless you can further qualify it, you're going to be limited to that other part.

Now, I went down this road before, and I got trapped into it, and I'm not going to get trapped in again because the testimony, as I recall it, was based not upon books at all, but upon figures that were given to you by certain people in the company and who told you to put them there and you put them there. And we're not going to get into that again.

MR. RUTHERFORD: Judge, 65B covers the entire period and is a revision of 65A, which was the exhibit that went into evidence last time.

THE COURT: I don't care what went into evidence before. I'm saying to you that the exhibits that can be used that he can testify that's based upon what comes outside of those books. You have no objection to, right?

MR. WALPIN: That is correct, your honor.

THE COURT: And he's entitled to put them on, but when you get beyond that is where we're going to have your troubles. I don't know what 65B or A or any of it, I don't know what they show.

MR. RUTHERFORD: Judge, would you let me, for [762] about five minutes, tell you?

THE COURT: No, I won't let you. He can tell me. He just got through telling me that part of it isn't based on the books. Now, we had that before and it got in before it could be stopped, and we had nothing but problems with it.

And I'll say it to you, frankly one of the main reasons I gave a new trial was because, in my opinion, I should never have let this witness testify as an expert because you didn't list him as an expert. You listed him this time so we've got that, but he did not qualify before as an expert in the other field. He didn't base the information that he had given in this record before upon what the books or anything showed or what he come up with but with what certain people in the company told him to put there.

Now, that's what the record was on it, and we're not going to get into that again. Now, you can put what those books show, and they are not objecting to that, and you might as well — I would suggest you do that if you have it in a form and then we'll cross the other when you get to it.

But I can tell you that based upon the — what he said at this point, you're going to have to really qualify it and get down to that, and I'll take that part when we get to it. If you don't have them broken down into that basis, [763] you can get them broken down. Are part of them in that basis — that basis?

THE WITNESS: Yes, sir.

THE COURT: Which ones are based solely upon the figures from the books?

THE WITNESS: Everything in the operating expense —

THE COURT: I don't care anything about that. In these exhibits, is there any of these exhibits that is limited only to that?

THE WITNESS: No, sir.

THE COURT: Is there any parts of the exhibit that is limited only to that?

THE WITNESS: Your honor, there are about three accounts, three expense accounts, that have charges from another company, charges that were paid by another company.

THE COURT: Bring the jury in and let me send them home until Thursday.

* * * * * * *

[764] (DISCUSSION OFF THE RECORD)

(JURY EXCUSED)

THE COURT: Now, gentlemen, we were down this road when we tried this case before, and, as I recall it, I have a fair recollection of it. There was a considerable amount of testimony that dealt only with income, expenses and some matters of that kind, right, that pertained only to sis?

THE WITNESS: Yes, sir.

THE COURT: And then they went beyond that and we got into fields. We got it in there, and then when they got into the other part, it developed that it was not based upon any records set out in the books, period. And what I'm saying to you now is that the two are completely different.

Now, as I understand the defense, they are not complaining about what's actually in the books and records, right?

[765] MR. WALPIN: That is correct, your honor.

THE COURT: There's no argument about that. There's no question but what you're entitled to put that in. But when you come to the other part, it presents a completely different story, and unless you got a better foundation than what you had before, what you put in before, you're not going to get in before this court, in this trial.

MR. RUTHERFORD: If your honor please, what I anticipate — what I anticipated when I came here with this case this time is this. We have made a considerable effort to eliminate any issue about whether or not an invoice is or is not included in these calculations. Everything — that is every bit of arithmetic — let me put it that way, every bit of arithmetic is my belief has been checked by —

THE COURT: He just said that every bit of the arithmetic is not every bit of the arithmetic.

MR. RUTHERFORD: May I finish?

THE COURT: You may finish. I said did he not say it was beyond that? Now, you didn't make it.

MR. RUTHERFORD: I did not make it.

THE COURT: Are you telling me that there's nothing in here but what's in the records and books that they reported for income tax purposes at SIS?

MR. RUTHERFORD: Did some of them get into the general ledger? No, they didn't. Is there a payroll [766] figure —

THE COURT: I didn't ask you that. I said are you prepared to tell me that all the entries that are in that, if you know?

MR. RUTHERFORD: Mr. Tipton's salary is a known figure. He gave testimony that there's ten per cent.

THE COURT: I'm not going to get into that. That's part of the other part of the situation, and I'm suggesting to you that you can take the part there's no argument about and then when we get to the other part as to what his salary — he's already testified that he got a certain per cent of the — off of the sales, and this, that, and the other.

MR. RUTHERFORD: That's in there. There's no question about the fact that that's in there and —

THE COURT: Just let me finish. I made clear to you what you have and unless you want to do that, they are out. Now, I'm just not going to get into it with respect to what I got into it before.

In other words, as to the matters that are in dispute as to the matters that are being argued about, you can take up separately after you put in the bare bones that are in there, and they are in there where you can tell them?

THE WITNESS: Yes, sir.

THE COURT: Yes, sir, they are there. So you got [767] no problem doing it.

MR. RUTHERFORD: Judge, the defense has developed that figure. It's in their statement. There's a difference of a hundred and sixty five thousand dollars between his number and the defense's number. There isn't any question about their number. There isn't any question about his number, and the difference amounts to three items.

It amounts to whether or not there's an appropriate allocation of a whole group of overhead figures. It amounts to whether or not the certain expenses, which are attributable to the first computer, are properly charged, and there's an issue of whether or not expenses which are attributable to the second computer are properly charged, and those are the only issues that need to be tried.

THE COURT: Well, I'm saying to you that you can put the other stuff in where you have it and we'll try those and you can reach that point and we'll cross that bridge when we get to it. But I'm going to see what they are when we get to it.

If it's like they were before like some of them, I'm not going to let them in.

MR. RUTHERFORD: Judge, I don't want to tell the jury that the damages are ninety five thousand dollars. My case is that the damages are two hundred and sixty one thousand dollars, and that includes some allocation of [766] overhead, and it includes costs on the —

THE COURT: I don't want to argue. I'm telling you what you can put in without the argument, and then we'll take that other piece by piece.

You haven't qualified your man here today, in my opinion, as an expert, and he didn't qualify himself before the other. He said he put in there what Mr. Tipton told him to put in there.

Now, you can do anything you want to. I don't care what you do. I'm trying to be fair with you and tell you that you're going to do it the — that I'm not going to let you take the matters that are disputed and just wade out there and say, "here they are." No way. We're going to cross each one of them when we get to them.

You know and I know that they are completely separate. You know and I know and he knows that they were not in the original setup that he had here before, that he jacked that thing up before as a result of cutting around with it three or four times and as a result of what some of your clients told him. Now, that testimony I'm not going to let in unless he has got some other basis.

I announce a recess as far as you're all concerned until ten o'clock Thursday. You can do whatever you want to do about it. I'm telling you what's going to happen on it.

The last time I let you go without even listing [769] him as an expert. You listed him as an expert this time and, in my opinion, it's a sixty four dollar question whether or not he is an expert.

(Adjournment)

APPENDIX D

Excerpt From The Dealer Agreement

DEALER AGREEMENT

AGREEMENT made as of the 27th day of February, 1975 by and between BASIC/FOUR CORPORATION ("Seller"), a corporation duly organized and existing under the laws of Delaware, having a principal place of business at 18552 MacArthur Boulevard, Irvine, California 92707, and CENTRAL MICROFILM SERVICE CORPORATION ("Dealer"), a corporation duly organized and existing under the laws of Missouri having a principal place of business at 1601 Washington Ave., St. Louis, Missouri 63103.

In consideration of the covenants and undertakings hereinafter set forth, the Seller and the Dealer agree as follows:

1. Definitions

The following terms when used in this Agreement shall, except where the context otherwise requires, have the following meanings (such definitions to be equally applicable to the singular and plural forms thereof):

A. The term "Territory" shall mean the geographical area described in Schedule A annexed, as the same may from time to time be amended in accordance with paragraph 29.

B. The term "Product" shall mean any product, including (unless the context otherwise requires) any component, device, feature or accessory thereto, manufactured by or for the Seller which is listed in Schedule B annexed, as the same may from time to time be amended in accordance with paragraph 3.

C. The term "System" shall mean a computer bearing Seller's trademark which is included in Schedule B.

* * *

[2] 2. Appointment

A. Subject to the terms and conditions of this Agreement, the Seller hereby appoints the Dealer, and the Dealer hereby accepts, the appointment as the exclusive dealer of the Seller for the Products in the Territory.

* * *

[9] 13. Software

A. The Dealer shall be responsible for providing adequate software programming to meet the requirements of purchasers of Systems from it. Such programming services shall also meet reasonable standards established from time to time by the Seller.

B. The Seller will, if requested by the Dealer, provide the Dealer with the Preplanned Applications. The Seller shall provide, at no charge, to the Dealer one (1) copy of the existing documentation relating to each Preplanned Application and one (1) copy of the related software placed on disc cartridge(s) provided by the Dealer or sold to the Dealer as provided in subparagraph E, provided that each such set may be used by the Dealer only for demonstration **[10]** purposes and may not be sold or furnished to any third parties. The Dealer shall pay to the Seller a royalty fee as set forth in Schedule C each time a Preplanned Application is installed on a user's System sold by the Dealer. The Dealer shall, within ten (10) days following the end of any calendar month, report to the Seller as to the Preplanned Applications installed within such preceding month (including, without limitation, the name and address of the user) and shall, within thirty (30) days following the end of any calendar month, pay the royalty fees due for such month, together with any applicable sales or use taxes thereon. The Dealer shall not sell the Preplanned Applications to any person, firm or corporation at any prices other than those set forth in Schedule C. The Seller may, on ninety (90) days' notice, change

the prices or royalty fees for Preplanned Applications at any time and from time to time, provided that the changes are made applicable generally to dealers of the Seller in the United States. The Seller shall furnish to the Dealer, at no charge, all revisions and updates to the Preplanned Applications if the original has theretofore been requested by the Dealer. Training with respect to use of the Preplanned Applications shall be furnished to the Dealer as provided in paragraph 11.

C. To the extent available, the Seller shall provide the Dealer with a list of the User Software and the Dealer may request that the Seller furnish the Dealer with documentation and programs for any specific User Software. If so requested and if available, the Seller will furnish the related User Software to the Dealer for a fee based upon the Seller's time, billed at a rate of $20 per hour or such other rate of the Seller as then in effect, and its expenses. The Seller shall invoice the Dealer for such fees and expenses, which invoices shall be payable within thirty (30) days from the later of the date of invoice for the User Software or the date of delivery thereof. The Seller may, on ten (10) days' notice, change its fee at any time and from time to time. Training and other services with respect to the User Software will, at the Dealer's request, be furnished at the Seller's then current rates.

D. Upon termination or cancellation (by the Seller) of this Agreement, the Dealer shall return to the Seller the Preplanned Applications and the User Software furnished to it and not installed at a user of a System for which payment has been made. In the event that the Seller so elects, or if this Agreement is cancelled by the Dealer, the Dealer may therafter continue to exercise the license described in subparagraph G provided all royalty fees are paid to the Seller.

E. The Seller will invoice the Dealer for disc packs [11] related to the Preplanned Applications or the User Software at prices set forth in Schedule B less a discount of 33%.

F. The Dealer is authorized to obtain or create its own software packages, provided that such packages will be compatible with, and will in no way damage, the Systems. Except as provided in subparagraph B, the Dealer may determine its own price to purchasers from it for any software programming (including, without limitation, User Software) furnished to any such purchaser.

G. To the extent that the Dealer and purchasers of Systems from it wish to utilize the Preplanned Applications or User Software, the Seller hereby conveys to them a nonexclusive, nonassignable license for use of the Preplanned Applications or User Software, with the Systems, but such license does not include the right to reproduce, publish or license the Preplanned Applications or User Software, to others. The Seller reserves expressly, and the Dealer and purchasers of Systems from it expressly consent that, the entire right and title to the Preplanned Applications or User Software shall remain with the Seller, and the Seller has the exclusive right to protect by copyright or otherwise, to reproduce, publish, sell and distribute such material to anyone. In recognition of the Seller's proprietary rights in the Preplanned Applications or User Software delivered to the Dealer and purchasers of Systems from it, they further agree to place on each copy or reproduction of the Preplanned Applications or User Software the identical notice contained on the Preplanned Applications or User Software furnished by the Seller to the Dealer.

H. The Seller believes that the Preplanned Applications or User Software being furnished hereunder are accurate and reliable, but the Seller does not assume any liabilities with respect thereto. Reference is made to paragraph 15.

I. The Preplanned Applications or User Software are furnished to the Dealer as a convenience and aid to the Dealer and the furnishing of the Preplanned Applications or User Software shall in no way relieve the Dealer of the responsibility to provide adequate software programming services for purchasers of Systems from it, as provided in subparagraph A.

• • •

APPENDIX E

PLAINTIFF'S EXHIBIT 163*

THE BASIC/FOUR CORPORATION DEALERSHIP PROGRAM

Introduction

The Basic/Four Corporation markets its computer products through three direct marketing channels, Basic/Four Corporation Branch office locations, Dealerships, and MAI International.

Branch offices are established in approximately 13 locations with MAI International marketing in 15 foreign countries. Dealerships are now operating in the United States in four locations, with new locations opening monthly.

There are more than 1400 BASIC/FOUR computer systems installed.

The following paragraphs present in abbreviated form the essence of the dealer agreement.

Territory

Basic/Four Corporation grants to qualified dealers, approved by Basic/Four Corporation, exclusive dealerships of the BASIC/FOUR computer system product line.

These dealerships are established in certain cities within the United States that have a minimum of 1,000 companies with twenty or more employees per the Dun & Bradstreet current listings.

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* Exhibit 163 as admitted in evidence contains certain handwritten notations which do not bear in any way on the issues at hand. They have therefore been omitted from this printed copy of Exhibit 163.

The dealership territories are established within a twenty to forty mile radius of the geographic center of these metropolitan areas.

Marketing

The dealer must employ, for the sole purpose of marketing the BASIC/FOUR product line, a sufficient number of sales personnel and software personnel to support the marketing effort and obtain quota.

Dealer performance is measured by a previously agreed to quota. This is based on a multiple of 1,000 prospects in a dealer's territory containing more than twenty employees.

It is expected that each dealer will sell five systems per 1,000 prospects the first year of operation; ten systems the second year of operation; and ten systems the third year of operation.

The dealer must establish and maintain appropriate, attractive and accessible premises and facilities for the display and demonstration of the system.

The dealer must purchase a BASIC/FOUR system for the sole purpose of display and demonstration. This system is not part of dealer's quota and is purchased at a forty per cent discount.

The dealer must undertake promotional compaigns and canvass prospective users to stimulate the sale of the BASIC/FOUR product.

The dealer purchases all computer hardware from Basic/Four Corporation at a 33 per cent discount.

Basic/Four Corporation provides as part of the price of the computer system the systems software, BOSS (BASIC Operating Systems Software).

Software

The dealer will provide by whatever means he feels necessary all required application software contracted between the dealer and the dealer's customer for the satisfactory performance of the system. Applications software can be a source of additional revenue for the dealer.

Basic/Four Corporation has a customer reference file of installed customers that is available to the dealer for the specific purpose of reference selling the product line to new customers in the dealer's territory.

Basic/Four Corporation will provide free of charge technical assistance on all aspects of marketing the BASIC/FOUR product line, and has established a corporate dealership department to interface with established dealers via teletype, telephone or in the dealer's territory.

Maintenance

The dealer is required to enter into an agreement with SORBUS, Inc. to provide the warranty and continuing maintenance of all BASIC/FOUR equipment installed in the dealer's territory. SORBUS, Inc. is the largest independent maintenance and service organization in the United States that specializes in data processing equipment. SORBUS services over 34,000 units of data processing equipment — with service in over 100 cities across the nation, and it employs approximately 1,000 service personnel.

Basic/Four Corporation Support

Basic/Four Corporation will provide direction and assistance to the dealer on all advertising, sales promotion, and public relations campaigns conducted in the dealer's territory. This can take the form of ad mats, national advertising and publicity. In addition, the entire introductory promotion campaign of the BASIC/FOUR product line in comparable localities has been tried, tested and proven and is totally documented for the benefit of the new dealer.

Basic/Four Corporation will provide sales and systems training of dealer personnel at Basic/Four Corporate offices at no charge. The dealer is required to pay all transportation, meals and lodging expenses for such personnel. If the dealer elects, the training of dealer personnel can be accomplished at the dealer's location. In this instance, the dealer must pay all expenses incurred by Basic/Four Corporation to conduct this training at his location.

Basic/Four Corporation will provide promotional materials at current printing costs to the dealer for the purpose of marketing the BASIC/FOUR product line.

Administration

The dealer must demonstrate to the satisfaction of Basic/Four Corporation that it has sufficient equity to finance its accounts receivable and to pay Basic/Four Corporation for its purchase of BASIC/FOUR systems within thirty days from the date of invoice or the date of delivery to the dealer, whichever is later.

The duration of the Dealership Agreement is for a three-year period, renewable for one year intervals thereafter if required quota has been met.

The dealer shall not manufacture, sell, deal or otherwise be interested in any systems directly competing in the territory with the BASIC/FOUR system.

The dealer nor Basic/Four Corporation shall employ any employees of the other for one (1) year.

Products

The products are those computer systems and add-on items presented in the accompanying sales literature.

The dealer can provide software services to his customers and realize revenue in addition to revenue from hardware.

APPENDIX F

PLAINTIFF'S EXHIBIT 8

Basic/Four Corporation

November 25, 1975

Mr. Robert D. Bodkin
President
Central Microfilm Service Corporation
1601 Washington Avenue
St. Louis, Missouri 63103

Dear Mr. Bodkin:

Thank you for the time and courtesy extended to me during my recent visit to St. Louis. I know that we both are unhappy with the performance of the BASIC/FOUR dealership to date and agree that through a concerted, dedicated effort, this situation can be resolved and that we can expect the success we both desire.

As we discussed in our meeting, we have completed the first six months of our dealership year together as of October 31, 1975, and it is appropriate to review the past performance and to make plans for the six-month period ahead.

During the period May 1, 1975, through October 31, 1975, Schedule D of your Dealership Agreement established a purchase quota of $192,000. Purchase orders from St. Louis Information Systems during this period totaled $64,422 which represents a 33% attainment of quota.

Schedule D of your Agreement calls for purchase quota to be increased to $288,000 for the period November 1, 1975, through April 30, 1976. This coupled with the deficiencies from the first six months will require purchase orders of a minimum of $415,578 over this six-month period.

BASIC/FOUR would like to propose the following plan, which we discussed and agreed to in our meeting, to assist you in attaining 100% of quota for your first year:

1. St. Louis Information Systems should increase the BASIC/FOUR sales staff to sell at the prescribed quota level. This staff should consist of at least three men, in addition to Mike Frankwicz, so you must begin immediately recruiting activities to hire a minimum of two additional marketing representatives.

2. Our experience has proven that proper sales training is essential for the greatest assurance of success. We hold Sales Training Classes at our Corporate Headquarters in Irvine, California on a regularly scheduled basis which is available to both BASIC/FOUR employees and employees of our dealerships. Neither of the salesmen that you have hired since becoming a BASIC/FOUR dealer have attended this school, and we feel the absence of this training has created a longer lead time to productivity. With this in mind, we recommend that the new salesmen that will be hired attend the Sales Training Class which is scheduled for January 19th. We recognize the cost to St. Louis Information Systems in both money and time, but we are confident that their attendance will create an end product that will return dividends far in excess of this expenditure.

3. Systems installation and programming manpower for the approximate eleven systems which you need to sell in the next six months is estimated at two men, if these are CBS installations. Obviously, if these are to be custom installations your requirements will double. It will be necessary for you to hire one additional systems man immediately, and make plans for the second person in concert with your sales achievement. Success beyond the minimum established goal will require additional staffing, and we advocate that you begin to develop outside software vendor master agreements to provide an alternative to increased staffing.

4. CMSC has developed an outstanding reputation in the St. Louis marketplace over the past twenty-seven years, and this must be used for the development of credibility of the BASIC/FOUR operation. This can best be accomplished by the direct personal involvement of yourself and Jack Tipton.

5. The prospect/suspect base which has been developed through leads from both BASIC/FOUR national advertising and marketing representatives in other areas of your company, coupled with the normal marketing activities of the BASIC/FOUR staff appears to be of significant enough volume to anticipate at least three immediate potential closable situations. To accomplish this, a team concept should be immediately undertaken. This team will consist of yourself, Jack Tipton, Mike Frankwicz, Jerry Berlinger, and the newly hired salesmen. All prospects should be analyzed and rated as to the immediacy of close, and a marketing plan should then be developed for each one. Concentrated activity should commence so that a minimum of three systems can be secured by December 31, 1975.

The establishment of these objectives with adherence and dedication to the same can only have one result—the success we mutually desire. The hiring of additional marketing and systems people with involvement by upper management in hiring and closing will relieve Mike Frankwicz of the present situation of having to wear three "hats." On January 1, 1976, the deficiencies in quota attainment and manpower should be resolved, and Mike will be in a position of exercising his capabilities as a General Manager of this important division of your operation. We should then look forward to a minimum of two orders each and every month through April, which will bring you in excess of your quota objective for the year.

We at BASIC/FOUR are willing and anxious to work with you toward a successful dealership in St. Louis. I am confident

that these mutual efforts will assure us of obtaining our objectives.

Sincerely yours,

BASIC/FOUR CORPORATION

Donald D. Kirkwood
Dealership Manager
Central Region

DDK:kp

APPENDIX G

Plaintiff's Exhibit 15 A

Basic/Four Corporation

May 25, 1976

CENTRAL MICROFILM vs. BASIC/FOUR
Defendant's Exhibit T

Mr. Robert D. Bodkin
President
St. Louis Information Systems
1601 Washington Avenue
St. Louis, MO 63103

Dear Mr. Bodkin:

On April 30, 1976, the one year anniversary of your BASIC/FOUR Dealership in St. Louis was reached, and I would like to address myself to your performance during this period. The Dealership Agreement executed by you and Basic/Four Corporation on February 27, 1975, established in

Schedule D Purchase Quotas for the first year in the amount of $480,000. You have attained during this same period, one (1) system order for a total of $91,106 of business which represents a total first year performance of 18.98%.

Basic/Four Corporation has elected not to invoke its cancellation privilege under Paragraph 6.A.2.d. of the Agreement and to enter into a Probationary Status Period with your corporation. The purpose of this probationary period is to establish realistic attainable goals as well as specific objectives to which you must adhere so that our relationship may continue.

During this probationary period your obligations are not waived and you shall remain subject to all terms and conditions of the Agreement. Although the decision on continuance of your Dealership after the probationary period will be predicated on the objectives of said period, it is expected that you will continue your efforts to achieve the targets specified in the original Agreement. Basic/Four Corporation, of course, will continue to exert our best efforts to provide support to you as specified in the Agreement.

The conditions of the probationary period are as follows:

A. Duration

June 1, 1976 through November 30, 1976 through November 30, 1976

B. Quota

$240,000 for the six-month period

C. Manpower

Effective June 1, 1976, three (3) full-time marketing representatives dedicated to the sale of BASIC/FOUR equipment must be in your employ. Hiring activities should continue during the term of probation to raise the headcount level to four

(4). The headcount must not fall below three (3) dedicated marketing representatives during the term of this probation. It is further anticipated that part-time marketing activity will be continued by M. Frankwicz.

D. **Mass Mailing**

Prior to June 1, 1976, a new "D&B" disc pack along with the "Market Master" disc pack will be ordered from Basic/Four Corporation. Upon receipt of these two items, each of your marketing representatives will mail a minimum of thirty (30) letters per week and follow up on same to generate an adequate prospect base.

E. **Show**

No later than August 31, 1976, a BASIC/FOUR Show must be held in St. Louis. This show must be conducted off-premises. Work on the details of this show should commence immediately as far as contracting with the hotel, moving company, Sorbus, etc. Invitations should be ordered and sent out approximately two weeks in advance of the show to all companies on the "D&B" disc. Follow up by telephone should be instituted at least one week before the show by your "Phone Power" group to insure the maximum participation. Secondary calls should be made within two days of the show to all of those people who indicated uncertainty relative to attendance.

F. **Software**

As orders are booked by St. Louis Information Systems, evidence must be given to Basic/Four Corporation of the ability to install successfully in a timely basis through either additional in-house staffing or contracts with outside software firms.

We are certain that you will agree that through this action of a probationary period we are giving your company every possible opportunity to realize the success which both our companies had anticipated at the time of signing the Dealership Agree-

ment. However, Basic/Four Corporation must retain its rights, and does not by this letter waive such rights, to terminate the Dealership Agreement pursuant to the provisions in Paragraph 6. Therefore, Basic/Four Corporation will terminate this Agreement on November 30, 1976, if the levels of performance specified for the probationary period are not met.

In view of the fact that this letter constitutes an amendment to our Agreement, please execute hereunder for countersignature by Basic/Four Corporation.

Very truly yours,

BASIC FOUR
CORPORATION

/s/ D. D. Kirkwood
Donald D. Kirkwood
Manager, Dealerships

Accepted and agreed to as of the date aforesaid.

BASIC/FOUR
CORPORATION

By /s/ illegible

ST. LOUIS INFORMATION
SYSTEMS

By /s/ R. D. Bodkin

kp

Supreme Court, U.S.
FILED
JAN 12 1983
ALEXANDER L. STEVAS
CLERK

No. 82-934

IN THE

Supreme Court of the United States

October Term, 1982

BASIC/FOUR CORPORATION,
Petitioner,

against

CENTRAL MICROFILM SERVICE CORP.,
Respondent.

REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT[1]

The basic fallacy in CMS' brief is its refusal to recognize that the new trial order at issue here is founded on the District Court's discretionary evaluation of the evidence presented at trial. *E.g., Simpson* v. *Skelly Oil Co.*, 371 F.2d 563, 570 (8th Cir. 1967) ("In ruling on a motion for

1. The only issue involved herein is the use of mandamus to review a new trial order. We therefore do not respond to most of the voluminous (and erroneous or incomplete) references in CMS' brief to issues and evidence irrelevant to that issue.

new trial, the trial court should exercise its independent judgment after a weighing of all the evidence and any other pertinent factors in determining whether the verdict was against the clear weight of the evidence or would result in a miscarriage of justice"); 6A *Moore's Federal Practice* ¶ 59.08[5] (2d ed. 1982).

The District Court expressly stated that its decision was, pursuant to this standard, based on its evaluation of the "credible evidence" (Pet. p. 8 n.4).[2] To avoid the obvious conclusion that mandamus is unavailable to review such a discretionary finding, CMS misstates that the District Court held "*as a matter of law* that all CMS's computed software losses . . . are not recoverable" (CMS Br. p. 3; emphasis added). Such characterization is refuted both by the District Court's opinion and by CMS' repeated concession that the new trial order was based upon "findings of fact" (CMS Br. pp. 2, 3, 9, 11, 12 n.9, 13). Such findings of fact may not be reviewed by way of mandamus. See Pet. pp. 8-9.

Nor should CMS, by asserting that the District Court's findings of fact were without evidentiary support, be able to "back-door" this Court's approval of employment of mandamus to review the trial record. Such a ruling "would 'run the real risk of defeating the very policies sought to be furthered by' " the Final Judgment Rule [*Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 35 (1980)], by opening the floodgates to burdening appellate courts with exactly the

2. All abbreviations used in the Petition for a Writ of Certiorari will be used herein. In addition, the petition will be referred to as "Pet." and CMS' opposing brief as "CMS Br." All transcript and exhibit references are to the second trial.

type of full scale review that this Court and Congress have mandated must await final judgments.[3]

Significantly, CMS fails to cite any case in which mandamus was used to review a new trial order based on the district court's discretionary evaluation of the evidence on which the jury verdict was based: neither *Grace Lines Inc.* v. *Motley*, 439 F.2d 1028 (2d Cir. 1971) nor *In re United States*, 565 F.2d 173 (1st Cir. 1977) (CMS Br. pp. 15-17), supports CMS' position;[4] nor has further research uncov-

3. In fact, CMS mischaracterizes the record by asserting the absence of evidence to support the District Court's findings of fact (CMS Br. pp. 3, 17). The record in fact conclusively *refutes* CMS' argument that its substantial investment of time and effort in software services was required by the dealership agreement (the "Agreement") and made at B/4's request (*id.* pp. 9-12, 17). Rather, the evidence established that CMS had total discretion to contract with independent vendors or to find other alternatives for such services, instead of expending its own resources for that purpose. The very exhibits upon which CMS relies support this conclusion: the B/4-prepared summary of the dealership program (Ex. 163, CMS Br. pp. 9-10, A27-A30), received by CMS during the pre-Agreement negotiations, clearly announces that "[t]he dealer will provide [software] *by whatever means he feels necessary*" (A29; emphasis added); Exhibit 8 (CMS Br. pp. 10, A31-A34) contains B/4's recommendation that CMS turn to "outside software vendor master agreements" as "an alternative to increased [in-house] staffing" (A32); and B/4, in Exhibit 15-A (CMS Br. pp. 10-11, A34-A37), reminded CMS of the alternative of "contracts with outside software firms" (A36). Further, (a) CMS admitted it was aware, even before signing the Agreement, that it could satisfy its contractual obligation to provide software by arranging with independent software vendors to perform programming work for end-users (Tr. 430); (b) that software was available to CMS from sources other than in-house development was undisputed (Tr. 138-41, 432, 443-44, 1174-75, 1234; Exs. AT, CB); and (c) beginning as early as December 22, 1975, B/4 consistently urged CMS to utilize third party software vendors (*e.g.*, Tr. 105, 431-34; Ex. AT).

4. *In re United States*, a criminal case, involved the district court's application of an improper legal standard to grant a new trial on the basis of a *post*-trial proceeding; *Grace Lines* concerned the

(footnote continued on next page)

ered any such case. Indeed, in *General Motors Corp.* v. *Lord*, 488 F.2d 1096 (8th Cir. 1973), cited by CMS (CMS Br. p. 16), involving the legal issue of admissibility of evidence and, indirectly, a partial review of the record—not even the full scale review CMS advocates here—mandamus was held inappropriate to review the new trial order. 488 F.2d at 1100. As the court there stated:

> "This evidentiary question, which was the essential question addressed by the trial court, is no different than any other evidentiary issue trial judges decide in the course of granting motions for new trial. To grant extraordinary relief here would be to abrogate the final judgment rule, and allow any litigant, who is forced to retrial on an evidentiary question, immediate review simply by styling his action a petition for writ of mandamus instead of appeal." *Ibid.*

This holding applies equally to the evidentiary issue on which the instant new trial order was granted.

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proper treatment of a juror's remark at the time of rendering the verdict. CMS' reliance on *Grace Lines* indicates the absence of viable authority for its position: that case has been effectively repudiated by the Second Circuit itself [*United States* v. *DiStefano*, 464 F.2d 845, 850 (2d Cir. 1972)], and otherwise generally rejected [*General Motors Corp.* v. *Lord*, 488 F.2d 1096, 1100 n.2 (8th Cir. 1973); Note, Supervisory and Advisory Mandamus Under the All Writs Act, 86 Harv.L.Rev. 595, 597 n.9, 608 n.62 (1973)].

Conclusion

B/4's petition for a writ of certiorari should be granted.

Dated: January 12, 1983

Respectfully submitted,

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